Reaching Across Legal Boundaries: How Mediation Can Help the Criminal Law in Adjudicating "Crimes of Addiction"

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I. INTRODUCTION

Modern criminal jurisprudence is experiencing a "crisis of self-definition."[1] In recent times, retributive theory has been a central force underlying our criminal justice system. Society expects criminals to be held "responsible" for their crimes, garnering proportionate sentences that correspond directly to the depravity of a particular offense. Through retributivist ideology, the social order is preserved, as potential criminals are deterred from engaging in future unlawful conduct. However, as retributivism confronts increasing challenges from countervailing theories, the foundations of our modern criminal jurisprudence are being called into question. Specifically, the doctrine of rehabilitation continues to emerge as an attractive alternative for adjudicating "crimes of addiction" such as non-violent drug abuse and alcohol-related offenses. In these settings, where treatment is imperative, it seems implausible to refer these offenders to a criminal justice system that emphasizes penological instead of rehabilitative objectives. Consequently, the adjudication of crimes of addiction in the criminal courts represents a misguided approach because it fails to effectively treat the addictions that ignite criminal acts, leaving offenders in a position to repeat offenses once incarceration terminates.

This is the point at which our criminal court system, with its emphasis on retributivist jurisprudence, is particularly vulnerable, and where alternative dispute resolution (ADR) mechanisms, such as court-sponsored mediation, emerge as a tenable alternative. The most efficacious method to deal with crimes of addiction is to refer offenders to institutions that can successfully serve a rehabilitative, not retributive, function. Because of their informal and congenial paradigm, specific ADR mechanisms, such as drug courts and

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[1] Book Note, *Rehabilitating Theories of Punishment*, 104 HARV. L. REV. 1126 (1991) (reviewing DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY (1990)) (examining the ability of the penal system to address contemporary problems in society and studying philosophical approaches as a means of evaluating the role of punishment in the criminal system).

court-sponsored mediation, can successfully implement the former approach, and thus more appropriately and effectively adjudicate crimes of addiction. These mechanisms are better suited to deal with these offenses because their informal structure allows them to address the insidious addiction that lies at the core of these criminal acts. In this way, mediation can serve as an effective *means* for resurrecting rehabilitative *ends* that address an individual's addiction, thereby leading offenders onto a path of recovery. In doing so, mediation can converge with the criminal law in vindicating both society's and the victim's interest in eradicating the problem of addiction. Part II of this Note surveys the retributivist model, examining the criminal courts' role in endorsing retributive theory as a central force behind its jurisprudence. Part III illustrates how adjudication of crimes of addiction in the retributivist-minded criminal court system has failed, and how the formal structure of the criminal courts would prevent implementation of alternative solutions such as rehabilitation. Part IV examines the rehabilitative model and studies the successful application of rehabilitation in the drug courts, a novel alternative dispute resolution mechanism. Part V concludes that, based on the success of the drug courts, rehabilitation is the proper and most effective end to pursue in fashioning a successful solution for crimes of addiction. Mediation, because of its informal and non-adversarial paradigm, can be a successful means to implement the rehabilitative ideal by playing a successful role in the adjudication of crimes of addiction.

II. THE APPROACH OF THE CRIMINAL COURTS: THE RETRIBUTIVIST MODEL

Retributivist theory is a driving ideological force behind our criminal justice system.[2] Retributivist thought strives to sustain "a moral justification for the practice of punishing [criminal behavior]."[3] Generally, retributivists justify punishment on two grounds. First, punishment exists to provide "just deserts" for criminal offenders.[4] Second, retributivist theory advocates punishment only to the extent that it directly corresponds with the depravity

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[2] *Developments in the Law—Alternative Punishments: Resistance and Inroads*, 111 HARV. L. REV. 1967, 1970–71 (1998) [hereinafter *Alternative Punishments*].

[3] David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1626 (1992). Dolinko questions the underlying justifications for retributivism concluding that retributivism suffers from several flaws that necessitate a re-examination of its application. *Id.*

[4] *Id.* at 1627–29 (criticizing the "just desserts" rationale underlying retributivism). Dolinko argues that the mere fact that criminals deserve to suffer is not sufficient to justify inflicting such suffering upon them.

of the moral act.[5] In this way, criminal punishment manifests itself in a proportional manner.[6] This Part examines the justifications underlying retributivism, followed by a discussion of the role retributivism plays in the criminal jurisprudence of the United States.

A. *Retributivism and "Just Deserts"*

Retributivism advocates punishment of the criminal offender.[7] The retributivist model views punishment as a moral good per se, as an effective response to the morally depraved actions of the individual.[8] While alternative theories employ forward-looking approaches,[9] retributivism is backward-looking, maintaining that punishment exists as its own good.[10] Retributivism does not justify its existence on the basis of contingently beneficial effects that may accrue to society.[11] Instead, it views punishment as an intrinsically worthy response to the previous transgressions of the individual.[12] In essence, punishment, as a moral matter, is permissible because it represents what the criminal offender deserves.[13] This notion derives its justification from the idea that the individual has the capacity to make volitional choices. These choices and the ensuing moral depravity serve as the principal justification for imposing punishment.[14]

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[5] *Id.* at 1636–42.

[6] *Id.* at 1636.

[7] *Id.* at 1626.

[8] *See, e.g.*, Herbert Morris, *Professor Murphy on Liberalism and Retributivism*, 37 ARIZ. L. REV. 95 (1995).

[9] R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, *in* 20 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 13 (Michael Tonry ed., 1996). Forward-looking goals include moral reformation, reparation, and reconciliation. Michael Tonry & Mary Lynch, *Intermediate Sanctions*, *in* 20 CRIME AND JUSTICE: A REVIEW OF RESEARCH 99, 133 (Michael Tonry ed., 1996).

[10] Duff, *supra* note 9, at 74.

[11] *Id.* at 10 (noting that these are simply peripheral, if not wholly irrelevant, considerations for the retributivist).

[12] *Id.*

[13] Dolinko, *supra* note 3, at 1626 (explaining how retributivists "claim that what makes the practice of punishment morally permissible is that criminals *deserve* punishment"). Hence, the term "just deserts."

[14] *Id.* at 1627 (outlining Immanuel Kant's proclamation that punishment "can never be used merely as a means to promote some other good for the criminal himself or for civil society, but . . . must in all cases be imposed on him *only* on the ground that he has committed a crime." (citation omitted)).

Several eminent philosophers illustrate the central themes that underscore the retributivist model. For example, C.W.K. Mundle explains, "the fact that a person has committed a moral offence provides a sufficient reason for his being made to suffer."[15] H.J. McCloskey echoes the central theme of retributivist proponents, suggesting that "if the deserved punishment is inflicted, all we need do to justify it is to point out that the crime committed deserved and merited such punishment."[16] Philosopher Michael Moore explains that "[t]he distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her."[17] These theorists highlight the proposition that retributivism exists not for social utility, but rather for the purpose of inflicting punishment for its own sake. The more troublesome query for retributivists is that, while a criminal may "deserve" punishment, it is not always apparent in what form and to what extent this punishment should be inflicted.

B. *Retributivism and the Proportionality Doctrine*

Retributivist theory not only views punishment as a good in and of itself, but it also seeks to render the "appropriate" punishment for the criminal offender.[18] The retributivist seeks just punishment, manifested by punishment that is proportional to the severity of the criminal act.[19] This compels an inquiry not merely into whether an individual deserves punishment, but into exactly what type of punishment the individual deserves.[20] This idea represents a crucial component of the retributivist

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[15] *Id.* (quoting C.W.K. Mundle, *Punishment and Desert,* 4 PHIL. Q. 216, 221 (1954)).

[16] *Id.* at 1627–28 (quoting H.J. McCloskey, *A Non-Utilitarian Approach to Punishment,* 8 INQUIRY 249, 260 (1965)).

[17] *Id.* at 1628 (quoting Michael S. Moore, *The Moral Worth of Retribution, in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 180 (Ferdinand Schoeman ed., 1987)).

[18] *Id.* at 1636.

[19] *Id.* In this way, retributivism differentiates itself from the often criticized deterrence theory. The retributivist school of thought holds that a deterrent approach inherently uses people in an improper manner inflicting suffering on the person punished as a device to compel others to act in a certain way. *Id.* at 1631.

[20] *Id.* at 1628.

> I see nothing methodologically unsound in putting forward the crucial tenet of retributivism, that punishment is morally justified insofar as it is just, that justice is moral consideration with regard to punishment, as a fundamental moral principle . . . . [P]unishment is just when it is deserved, and it is deserved by the commission of an offense. The offense committed is the sole ground of the state's

model. Retributivists believe that the "proportionality" facet of their approach adequately respects the individual as an autonomous person, not as a tool for a higher societal good.[21]

Some examples illustrate the retributivist notion of "proportionality." Simply stated, retributivists would punish serious crimes more harshly than minor ones.[22] The severity of punishment is always contingent upon the seriousness of the offense.[23] For example, an individual who is guilty of homicide may receive life in prison, while another individual who is guilty of theft may only receive a modicum of community service. Retributivists would simply assign greater penalties as an individual ascends the scale of criminal offenses.[24] Retributivists claim that we can adequately apportion the type of punishment an individual deserves.[25] As will be demonstrated, these theoretical underpinnings are at the core of the approach adopted in our criminal justice system.

C. *The Criminal Justice System Utilizes Retributivism as a Central Objective Underlying Criminal Reform*[26]

Before retributivism and punishment gained ascendancy in American criminal jurisprudence, the courts adopted approaches that sought to reform, rather than punish, the criminal offender. Indeed, during the mid-twentieth century, rehabilitation was cited as a dominant objective behind our criminal justice system.[27] During this period, the New York City Correction Commissioner stated that "[a]ll men are redeemable. Every man can be

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> right and duty to punish . . . Justice in these matters is to treat offenders according to their deserts, to give them what they deserve, not more, not less.

Id. (alteration in original) (quoting IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 147–48 (1989)).

[21] *Id.* at 1636. ("[T]he claim that the *amount* of punishment inflicted on offenders must be what they deserve is crucial to the retributivist claim not to use people as mere means.").

[22] *Id.*

[23] *Id.*

[24] *Id.* ("Unfortunately, this prescription by itself cannot tell us what punishment any particular crime actually deserves, even if we could rank every crime in a single scale from least to most serious.").

[25] *Id.* Some retributivist thinkers have attempted to quantify a system under which punishment would be apportioned proportionality. For example, John Kleinig believes that we can make a linear scale to rank crimes from least to most serious. *Id.*

[26] This reference to the criminal justice system encompasses both the legislative and judicial branches of government.

[27] *E.g.*, Williams v. New York, 337 U.S. 241, 248 (1949).

rehabilitated, and it's up to us in the community and in the field of criminal justice to see that this is done."[28] The Supreme Court echoed these sentiments in *Williams v. New York*,[29] explaining that "reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[30] Measures such as indeterminate sentencing, individualized sentences, parole, probation, alternative treatment programs, and increased discretion for judges permeated the criminal justice system.[31] These mechanisms underscored the belief that the criminal system needed to "cure" the offender by apportioning penalties that "fit" the individual more than the crime itself.[32] Consequently, rehabilitation ascended in the mid-twentieth century as the dominant penological response to criminal behavior.[33]

However, the use of rehabilitation in the criminal system was a conspicuous failure.[34] By the 1970s, the optimism and idealism that characterized the reformation movement slowly began to evaporate, as rehabilitation experienced a series of vicious criticisms, examining both its theoretical foundations and practical efficacy.[35] In the widely circulated study *Struggle for Justice*, the use of indeterminate sentencing was criticized

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[28] Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012 (1991) (citing Martin Tolchin, *Malcolm, a Black, Named Correctional Chief by Mayor*, N.Y. TIMES, Jan. 20, 1972, at 1, *reprinted in* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 91 (1973)).

[29] *Williams*, 337 U.S. at 248.

[30] *Id.* at 247. The *Williams* Court stated the following:

> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender . . . retribution is no longer the dominant objective of the criminal law.

Id. (citations omitted).

[31] Vitiello, *supra* note 28, at 1016. The implementation of these programs was based on the perception "of the criminal as sick and in need of treatment or rehabilitation." *Id.*

[32] *See, e.g.*, James Robison & Gerald Smith, *The Effectiveness of Correctional Programs*, *in* SENTENCING 118 (Hyman Gross & Andrew von Hirsch eds., 1981).

[33] Vitiello, *supra* note 28, at 1014.

[34] Robinson & Smith, *supra* note 32. A study by the California Rehabilitation Center found that, of those enrolled in the rehabilitation program, 67% had to be returned for further treatment, 33% received a new criminal conviction during their first release, and 71% were detected as having used drugs illegally. These findings exemplified the failure of rehabilitative efforts; *see also* Vitiello, *supra* note 28, at 1014 (explaining that by the mid 1960s, widespread criticism began to circulate that attacked the efficacy of the rehabilitative model).

[35] AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE 6–12 (1971) [hereinafter STRUGGLE FOR JUSTICE].

as a "tool of institutional control" used to increase "the power of the state to lengthen a prisoner's sentence."[36] *Struggle for Justice* also identified a class bias within rehabilitation programs, where whites were treated less harshly,[37] leading to gross inequities in length of sentences for similar conduct.[38] Judge Marvin Frankel joined in, criticizing the discretionary power rehabilitation afforded judges, explaining that "the almost wholly unchecked and sweeping powers we give to judges . . . [is] intolerable for a society that professes devotion to the rule of law."[39] He also criticized the parole system as without any direction or means to achieve its purported objectives.[40] This procedural laxity, according to Judge Frankel, perpetuated countless abuses within a system that seemingly espoused benevolent objectives.[41] The legislature subsequently chimed in, with Ted Kennedy accusing rehabilitation of being a "national scandal" that "breeds massive injustice."[42] Society also expressed its distaste, and the infamous Willie Horton scandal was the culmination of a rehabilitation system that had lost its way and failed in its purpose.[43] As a

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[36] Vitiello, *supra* note 28, at 1020 (quoting STRUGGLE FOR JUSTICE, *supra* note 35, at 28).

[37] *Id.* at 1021.

> A treatment-oriented system allowed the moral hypocrites to mollycoddle upper- and middle-class criminals because, although they are "morally weak and psychologically deficient, . . . they are not revolutionaries." Surely, a fallen member of the ruling class will need less reformative treatment than a member of the lower class who has not had the same advantages.

Id. (quoting STRUGGLE FOR JUSTICE, *supra* note 35, at 30) (citation omitted).

[38] *Id.*

[39] *Id.* at 1022, *quoted in* STRUGGLE FOR JUSTICE, *supra* note 35, at 7.

[40] *Id.* at 1023 "We charge [parole boards] to make indeterminate sentences determinate, yet we give them no conceptual or other tools to work with. We set them lofty goals of rehabilitation, but with no direction or means of achievement." *Id.* (quoting FRANKEL, *supra* note 28, at 95).

[41] *Id.* at 1023–24. Judge Frankel devoted his energy to establishing legislative reform of the inadequate indeterminate sentencing regime. *Id.* ("[Judge Frankel's] specific proposals provided a game plan for Congress when it eventually created a sentencing commission and empowered it to set up sentencing guidelines.").

[42] *Id.* at 1015 (quoting Ted Kennedy, *Introduction* to *Symposium on Sentencing* (pt. 1), 7 HOFSTRA L. REV. 1, 1 (1978).

[43] Willie Horton was a convicted murderer who was granted temporary release on selected week-ends pursuant to Massachusetts' "weekend furlough" program. During one of these releases, Horton committed another murder, prompting societal outrage and a call for "tougher" sentences for criminals. Paul Duggan, *The Barneses and the Horton Debate; The Couple's Role in the Bush Campaign*, WASH. POST, Oct. 28, 1988, at D8.

result, in the mid-1970s rehabilitation fell out of favor as a legitimate penological objective in criminal jurisprudence.[44]

In its place arose the retributivist model with a consequential resurrection of punishment. The Comprehensive Crime Control Act (CCCA) of 1984[45] effectively ended the era of rehabilitation and ushered in the era of retribution and punishment.[46] The CCCA implemented determinate sentences for criminal offenders, eliminated parole, and removed judicial discretion in decision-making by appropriating inflexible sentencing guidelines.[47] In effect, the Act sought to remedy the flaws that had led to the failure of rehabilitation in the criminal courts. By adopting this legislation, retributivism was resurrected in the latter part of the twentieth century.[48] The retributivist trend continues today, in both the legislative and judicial milieu, to enjoy support as a central objective underlying criminal reform. Whether it is the passing of legislation or the rendering of judicial decisions, punishment, not rehabilitation, is the consistent response of our system to criminal behavior. Indeed, the penological nature of our criminal jurisprudence is clearly manifested in two distinct areas: (1) "three strikes and you're out" laws;[49] and (2) the death penalty.

1. *"Three Strikes and You're Out": The Legislatures at the Federal and State Level Send a Retributivist Message*

Habitual offender laws are paradigmatic of the retributivist motivations that drive many legislative enactments. The retributivist underpinnings that lie at the heart of habitual offender laws such as "three strikes" can be traced back to the sixteenth century and colonial America.[50] Early legislation "sought to inflict harsh penalties on offenders who committed . . . crimes a

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[44] *See generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981) (surveying the fall of rehabilitation as a central aim of criminal jurisprudence).

[45] Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18 U.S.C.).

[46] Vitiello, *supra* note 28, at 1014, 1027.

[47] *Id.* at 1027.

[48] *Id.* at 1025–33. (outlining the Federal Sentencing Guidelines, which took a more retributive approach to criminal jurisprudence).

[49] "Three strikes" does not run afoul of retributive justice because after a third violent felony, life imprisonment without parole is a punishment proportional to such repeated acts of violence. Dolinko, *supra* note 3, at 1628.

[50] Michael Turner et al., *"Three Strikes and You're Out" Legislation: A National Assessment*, 59 FED. PROBATION, Sept. 1995, at 16, 17.

specified number of times."[51] Over time, habitual offender legislation proceeded to encompass a wider range of offenders within the purview of respective statutes.[52] Habitual offender laws continued to focus on punishment as the appropriate societal response, as "these laws ensured that more severe punishment would follow each conviction."[53] For Example, in 1797, New York enacted habitual offender legislation—later repealed—requiring "offenders convicted of their second felony to be sentenced to prison 'at hard labor or in solitude . . . for life.'"[54]

Other state legislatures followed suit with similar statutes, and habitual offender legislation flourished in the early twentieth century.[55] Six states passed additional habitual offender statutes in the 1920s.[56] By 1968, twenty-three states had enacted legislation that mandated life imprisonment after a designated number of offenses.[57] In addition, nine states had mandatory minimum prison sentences for repeat offenders, and the remaining states permitted habitual offenders to be sentenced to increased prison terms.[58] Consistently, these repeat offender statutes have imparted retributivist undertones, with harsh penalties serving as the dominant legislative response to repeat criminal offenders.[59]

These retributivist-driven statutes continue to sustain popularity at both the federal and state level, manifested by the novel "three strikes" legislation. Under "three strikes" law, an individual who commits three felonies automatically receives life imprisonment with no possibility of parole.[60] In 1994, President Clinton signed into law the Crime Bill of 1994, expressly heralding the "three strikes and you're out" provision.[61] This idea has also

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[51] *Id.* (citing W. F. McDonald, et al., *Repeat Offender Laws in the United States: Their Form, Use, and Perceived Value*, U.S. DEPT. OF JUSTICE, NAT'L INST. OF JUST. (1986)).

[52] *Id.* (citing Sir Leon Radzinowicz & Roger Hood, *Incapacitating the Habitual Criminal: The English Experience*, 78 MICH. L. REV. 1307, 1305–89 (1980)).

[53] *Id.*

[54] *Id.* (quoting Susan Buckley, *Don't Steal a Turkey in Arkansas–The Second Felony Offender in New York*, 45 FORDHAM L. REV. 76, 80 n.39 (1976)).

[55] *Id.* ("Most notable was the enactment of the Baume's Law by the State of New York in 1926, which required life imprisonment for third-time felony offenders.").

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 16.

[61] *Alternative Punishments*, *supra* note 2, at 1968 (citing Stephen Glass, *Anatomy of a Policy Fraud*, NEW REPUBLIC, Nov. 17, 1997, at 22).

entered prominence at the state level, with California being the first to implement "three strikes and you're out" legislation.[62] This was only the genesis of "three strikes" legislation, as 73% of voters enacted similar legislation in Washington State.[63] Currently, more than thirty-seven jurisdictions have proposed "three strikes" laws, and fifteen jurisdictions have enacted "three strikes" legislation.[64] Over 90% remove judicial discretion by requiring the judge to sentence the convicted offender as a habitual offender, and over 80% of these proposals aim to sentence habitual offenders to prison for life.[65] Moreover, the Kentucky and Pennsylvania legislatures have made the death penalty an option for judges who are sentencing individuals for their third felony.[66]

These statutes, and the uniformity with which they are being enacted, demonstrate that legislatures are opting for retribution, through punishment, rather than rehabilitation via treatment.[67] The current trend is indicative of the larger historical paradigm—punishment consistently represents the moral choice for redress when an individual transgresses the criminal code. The response from federal and state legislatures is uniformly punitive, resulting in a criminal system that places its values almost exclusively on punishment and retribution. Indeed, this approach has also received the imprimatur from the judiciary.

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[62] Gareth Cook, *Issues, Issues, Issues,* U.S. NEWS & WORLD REP., Nov. 21, 1994, at 28. Attorney General Dan Lungren has championed this notion, going so far as to credit "three strikes and you're out" with reducing the overall crime rate in California. *Id.*; *see also,* Cindy Moy, *California: Out-of State Convictions Count as Strike,* WEST'S LEGAL NEWS, Dec. 10, 1996, *at* 1996 WL 704865.

[63] Floyd Pedee, *Let's Try Law from Washington,* FLA. TODAY, Mar. 22, 1999, at 08A.

[64] Turner et al., *supra* note 50, at 19, 25. Furthermore, Georgia, Alabama, New York, Louisiana, and Vermont have adopted "two strikes and you're out" provisions, endorsing an even more drastic approach. *Id.*

[65] *Id.* at 33. In addition, these statutes seek to minimize the opportunity for an offender to be released on parole. *Id.* Clearly, these statutes evince retributivist undertones, as they seek to supplant judicial discretion with stringent, non-discretionary guidelines that accord the judge minimal latitude in sentencing the offender. *Id.*

[66] *Id.* at 19.

[67] This movement is driven by "tough on crime" politicians who believe incarceration and punishment are the best way to restore social order. *Id.* at 16.

2. *The Death Penalty:* Gregg v. Georgia *and the Affirmance of Retribution as a Dominant Penological Goal*

In *Gregg v. Georgia*,[68] the Court echoed the sentiment that retribution continues to serve as the dominant force behind the punishment-centered criminal courts. In *Gregg*, the issue before the Court was the constitutionality of recently enacted death penalty statutes.[69] The *Gregg* Court held that the death penalty did not amount to cruel and unusual punishment for purposes of the Eighth Amendment.[70] Instead, the Court determined that the death penalty served a valid penological purpose.[71] In arriving at this decision, the Court explicitly cited retributivism as a valid penological goal. Justice Stevens explained as follows:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.[72]

In *Thompson v. Oklahoma*,[73] Justice Stevens re-iterated these thoughts, suggesting that "as 'an expression of society's moral outrage at particularly offensive conduct,' retribution was not 'inconsistent with our respect for the dignity of men.'"[74] In *Furman v. Georgia*,[75] Justice Stewart, referring to the death penalty, explained, "[i]t is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."[76]

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[68] Gregg v. Georgia, 428 U.S. 153 (1976).

[69] *Id.* at 183 ("[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." (citation omitted)).

[70] *Id.* at 169 ("We now hold that the punishment of death does not invariably violate the Constitution.").

[71] *Id.*

[72] *Id.* at 183 (quoting Furman v. Georgia, 408 U.S. 238, 308 (1971) (Stewart, J., concurring)).

[73] Thompson v. Oklahoma, 487 U.S. 815 (1987).

[74] *Id.* at 836 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1876)).

[75] Furman v. Georgia, 408 U.S. 238 (1971).

[76] *Id.* at 306 (Stewart J., concurring).

Clearly, these statements illustrate that "the law typifies the ascension of a 'just deserts' penal philosophy . . . ."[77] As a result, the retributivist directive has permeated our criminal system, heavily influencing the manner in which criminals are treated.

The adoption of the retributivist model of punishment equates to an implicit rejection of utilizing ADR mechanisms, such as mediation, to resolve criminal disputes. As we will see below, mediation is an alternative forum where parties work collectively to search for creative solutions that respond to parties needs, not stringent legal directives.[78] In mediation, for example, parties are not predisposed to a specific solution because specific resolutions are not predetermined.[79] This inherently recognizes the premise that different solutions may be necessitated in different situations. However, this approach has been rejected by our criminal system in favor of a strict "uniformity" that singularly appropriates punishment, regardless of the type of case, crime or individual involved. Because of the stringent legal imperative, flexibility in unearthing inventive solutions is nominal, creativity becomes obsolete, and imagination is ignored. Thus, ADR, namely mediation, has no role to play because punishment represents a predetermined solution that varies in degree but never in kind. The criminal system never seeks to respond individually to the offender, because it impersonally appropriates punishment as the moral choice for redress, even if a better solution would be plausible. Unfortunately, the retributivist-centered approach now adopted by the criminal courts has not enjoyed universal success, particularly in the adjudication of crimes of addiction.

III. THE FAILURE OF THE RETRIBUTIVIST-CENTERED CRIMINAL COURTS IN ADJUDICATING CRIMES OF ADDICTION

While retributivism may be an invaluable and necessary tool in cases involving violent felons or habitual transgressors,[80] the utilization of

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[77] *Alternative Punishments, supra* note 2, at 1987.

[78] *See generally* FORREST S. MOSTEN, THE COMPLETE GUIDE TO MEDIATION (1997) (outlining the various types of mediation techniques that are employed to resolve disputes, and studying in depth the advantages and disadvantages of utilizing mediation in certain settings).

[79] *Id.*

[80] The purpose of this Note is not to suggest that retributivism ineffective in all circumstances. Instead, this Note endeavors to make a narrower point: that retributivism is ineffective in dealing specifically with crimes of addiction. This inherently recognizes that different criminal responses may be required depending on the nature and type of offense committed.

punishment for crimes of addiction has unfortunately been a conspicuous failure. Envision the following hypothetical situation: an individual is arrested and convicted for a vicious and cold-blooded murder. Most of us would agree that incarceration is a plausible judicial response, because it serves to remove the individual from society, thereby eliminating the threat of violence that he may pose to the community. We would probably concur that for many violent offenders, incarceration is necessary to achieve the goal and protect the community. In these circumstances, punishment via incarceration seems to be a valid penological objective.

However, imagine an individual who is repeatedly arrested for driving while intoxicated (DWI),[81] or an individual arrested for non-violent drug possession, or public intoxication while exiting a bar or restaurant. In all of the above mentioned situations, there is no "victim," at least not in the same sense as in violent offenses. Yet, these offenders are processed through the same criminal system that deals with murderers and rapists. The response, incarceration, is the same for crimes of addiction as it is for violent criminal offenders.[82] But is punishment really an effective remedy in these situations?

It is central to this Note that the retributivist-minded criminal courts are entirely ineffective, and wholly inappropriate, in adjudicating crimes of addiction. If we base the success of the criminal system on the vindication of the societal interest in seeing this behavior eradicated and the public welfare preserved, then the criminal system fails in adjudicating crimes of addiction for two reasons. First, by uniformly adopting punishment as its institutional response, the criminal courts have utterly failed to alleviate the addictions that lie at the source of these criminal acts. Thus, by failing to "reform" these offenders, the court system has perpetuated high recidivism rates, thereby keeping the community at risk. Moreover, despite these failures and the

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[81] When referring to DWI cases, I am assuming that no victim is involved. Some drunk driving incidents have resulted in fatalities, and for this particular sub-set of drunk driving crimes, retribution may be a plausible response. However, most DWI offenses are "victimless." Bill Teeter, *Legal Aliens with DWI Records are Arrested, Sparking Protests*, FORT WORTH STAR-TELEGRAM, Sept. 4, 1998, at 4 (commenting on the DWI arrests made in Texas along the border). In this scenario, programs that treat the underlying addiction are recommended. Such a response is especially plausible, because by treating the addiction at the outset, we may avoid the "fatal" DWI incidents that often occur at the hands of repeat offenders. *See* David S. Fallis & Katherine Shaver, *Loopholes Benefit Defendants; Drunken Drivers Learn to Circumvent System* (pt. 2), WASH. POST, Sept. 25, 2000, at A01.

[82] In fact, many first-time offenders do not even receive prison terms. Instead, they are released on probation to repeat the same crime. In 1997, in New Jersey, of the 513,200 people convicted of DWI, 454,000 were placed on probation. Pete Yost, *58,000 Drunken Drivers in Jail Another 454,000 on Probation*, REC., June 14, 1999, at A12.

tragedies they have engendered, the criminal system continues to be committed to its tradition of punishment in these cases. Second, even if the criminal system sought to adopt remedies that treated the addiction underlying these criminal acts, they would be structurally unable to do so. Because of the criminal system's adherence to strict procedural formality, and its commitment to adversarial dispute resolution, the courts are structurally unable to successfully adopt solutions that address the cause—addiction—of these crimes. The criminal courts are both unwilling and unable to adopt responses that have a practical chance for successfully adjudicating crimes of addiction.

A. *Despite Its Failure in Adjudicating Crimes of Addiction, the Criminal Courts Remain Committed to the Failed Solution of Punishment*

In the criminal courts, punishment, primarily imprisonment, is the penalty for individuals who are convicted of crimes of addiction. However, incarceration has proved completely ineffective, as evidenced by the recidivism rates of these offenders. For example, in New Jersey, the recidivism rate for drug offenders processed through the criminal courts is an astonishing 70%.[83] In the state of Florida, the recidivism rate for drug offenders is between 60 and 70%.[84] In New York, the recidivism rate is approximately 40%.[85] A recent study in Pittsburgh placed its recidivism rate at 70%.[86] These figures pale in comparison to the national rate—across the country, the average recidivism rate for drug offenders processed through the

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[83] A drop in recidivism also serves to save the state and the taxpayers significant financial capital. In county jails, more than 70% of convictions were the result of substance abuse. Editorial, *Try Drug Treatment,* STAR-LEDGER, Jan. 15, 2000, at D12 *available at* 2000 WL 4252336.

[84] Mark Killian, *Governor Bush Calls for Greater Use of Drug Courts*, FLA. B. NEWS 15, Nov. 15, 1999; Christopher Rebel J. Pace, *The Law Enforcement Community from Coast to Coast Is Turning to These Courts Because They Save Time, Money, and Lives*, LEGAL TIMES, Jan. 23, 1995, at 44 (explaining that the drug courts are cost-effective and significantly reduce the recidivism rate—only 10–33% of drug court "graduates" are re-arrested for post-graduation drug offenses).

[85] Gary Spenser, *Assembly Leaders Unveil Crime Package*, N.Y. L.J., Mar. 3, 1994, at 1, 2.

[86] Ben Schmitt, *Drug Court Offers a Second Chance at Productive Life*, DAILY REP., Apr. 12, 1999, at 4 (reporting on the various attributes of the drug courts and the advantages that they can offer to participants.) Drug courts not only benefit the participants, but serve to inform judges as well. As Michael Flaherty, Vice President of St. Francis Center For Addiction, explains, "It's a behavioristic program, one that also requires judges to understand the nature of addiction." *Id.*

criminal courts is an overwhelming 77%.[87] More than three-quarters of convicted drug offenders are repeating the same offenses of which they were initially convicted. In the case of alcohol-related offenses such as DWI, the statistics are equally as grim. For example, in New Jersey, over 30% of DWI offenders are repeat offenders.[88] Moreover, almost 10% of convicted DWI offenders in New Jersey have been convicted three or more times for the same offense.[89] These statistics demonstrate that the criminal courts are failing in their effort to prevent repeat offenses.

In addition to the statistics, legislators and regulators at both the federal and state level are acknowledging traditional punishment's failure to reduce recidivism for these categories of crimes. For example, Terry Schiavone, President of the National Commission Against Drunk Driving, explains that without alcohol treatment programs, "these are just drunk drivers waiting to get back on the road" because "[j]ail and probation have never cured the drunken driving problem."[90] Bob Voas, a researcher for the Pacific Institute in Maryland, notes, "[t]he problem with jail is that it does take the person off the road when they are behind bars, but if you put them in jail for six days, you haven't done much with the problem." [91] Senator Louis Kosco of New Jersey concedes that, "just putting someone in prison for 30 days does nothing."[92] Judge Charles Hill, who once believed in incarceration for drug offenders, admits "[d]rug addicts need help."[93]

However, despite these admitted failures, the criminal justice system remains committed to providing punitive responses for these offenders. New Jersey represents a case in point—Senator Kosco echoes the dedication to punishment, stating "I hope for stronger penalties for people who are convicted of drunk driving...."[94] Indeed, punishment is precisely the

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[87] *Id.*

[88] Yost, *supra* note 82.

[89] *Id.*

[90] *Id.* Schiavone points out that these figures represent failure in dealing with those offenders who have a serious problem with alcohol. Furthermore, those offenders with substance abuse problems represent a significant portion of all arrestees. *Id.*

[91] Doug Most, *State May Get Harder On DWI Repeaters a Focus On Drivers Flouting Revocation*, REC., Aug. 2, 1999, at A01.

[92] *Id.*

[93] *Treatment-Based Courts Saving Oklahoma Money*, J. REC., July 8, 1999, *available at* 1999 WL 9847060 [hereinafter *Treatment-Based Courts*]. Judge Hill, a former police officer for twenty years, endorses the drug court approach as the best way to rehabilitate substance abusers. *Judge Now a Believer in Drug Court Approach*, ASSOCIATED PRESS NEWSWIRES, July 6, 1999, *at* WL, 7/6/99 APWIRES 02:07:00 [hereinafter *Judge Now a Believer*].

[94] Most, *supra* note 91.

approach that New Jersey has endorsed. For example, in 1997, 513,200 individuals were convicted for DWI.[95] Of these offenders, 454,000 were placed on probation, while 41,100 were placed in local jails.[96] The remaining 17,600 offenders were incarcerated in state prison.[97] In terms of strict "proportionality," DWI offenders who were placed in local jails served an average confinement of eleven months.[98] Individuals who were placed in state prison were confined for an average of forty-nine months.[99] Thus, despite its apparent failure, New Jersey seems committed to punishing crimes of addiction. Treatment, or diversionary programs imparting a rehabilitative approach, are simply not options for DWI offenders in New Jersey.

In addition to New Jersey, Illinois, Connecticut, and Vermont have responded to alcohol related crimes of addiction by permanently revoking a person's license after their *fourth* DWI conviction.[100] In Illinois, drug-related crimes of addiction are garnering prison terms every year.[101] Last year, approximately 40% of drug offenders were sentenced to prison, and the number is increasing annually.[102] South Carolina and West Virginia have responded with license revocation punishment after multiple repeat offenses.[103] Some states have even turned punishment into humiliation, placing stickers on offenders' cars so that everyone knows they are DWI offenders.[104] Illinois Prosecutor Alphonse Tomaso states, "[a]n arrest in [the drug] area is a serious offense and we intend to prosecute those cases."[105] Despite astronomical recidivism rates, and the fact that over 30% of arrested individuals admit that they drink every day and use drugs, the data illustrates

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[95] Yost, *supra* note 82. Many of those arrested were repeat offenders. *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Most, *supra* note 91, at A01; *see generally* Peter H. Lederman, Letters to the Editor, *Little Due Process in DWI Cases,* N.J. LAW.: WKLY. NEWSPAPER, Mar. 24, 1997, at 6, *available at* LEXIS, News Library, News Group File.

[101] Martha Middleton, *Do Drug Courts Work?*, NAT'L LAW J., Nov. 2, 1992, at 1.

[102] *Id.* at 45.

[103] Most, *supra* note 91, at A01.

[104] *Id.* This strategy amounts to nothing more than humiliation and embarrassment. Such a strategy is especially bizarre considering the fact that many DWI offenders candidly admit to having a substance abuse problem. Yost, *supra* note 82.

[105] Middleton, *supra* note 101 (second alteration in original). Tomaso further states, "The law in the state of Illinois is a zero drug tolerance policy." *Id.* at 45.

that punishment continues to be the predominant legislative response.[106] However, these results do not seem to be sparking any reformation in the traditional paradigm.

Unfortunately, the perpetuation of high recidivist rates and commitment to a failed remedy has consequences; it has had tragic results. Recidivism rates are responsible for several tragedies that might have been avoided had the addiction been treated at the outset. A case in point is Scott Arp, a New Jersey driver, who had been arrested repeatedly for drunk driving in New Jersey.[107] Like other drunk drivers, Arp was processed through the criminal courts, given punishment, and released.[108] No attempts were made to address his potential alcohol addiction or to divert him to a treatment program.[109] Consequently, a short time after his release, Arp drove drunk again—this time crashing his truck through the windshield of a Volkswagen Jetta.[110] Dennis Curtin of Cresskill, New Jersey was killed in the crash.[111] New Jersey Highway Patrolman Pete O'Hagan explains that victims of addiction, "are the ones most likely to have the crashes."[112] The case of Scott Arp exemplifies the inherent tragedies in a system that has little effect on treating the underlying problem—substance abuse.[113]

In sum, the previous discussion highlights the proposition that, as long as the criminal system remains committed to punishment, there will be high recidivism rates, more tragedies like Scott Arp, and a perpetual threat to the community. Because of the criminal system's failure to search for alternative remedies in lieu of punishment, there remains little hope of vindicating the

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[106] This is clear evidence that many of these offenders are suffering from substance abuse problems. In fact, in a survey of convicted DWI offenders (1) about half admitted consuming approximately 12 beers in the hours before their arrest, (2) approximately half admitted they had been drinking for at least three hours before their arrest, and (3) about half reported that they had been in treatment programs for their problem. This clearly shows that for a large majority of offenders, addiction lies at the source of these criminal acts. Yost, *supra* note 82.

[107] Most, *supra* note 91.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* Scott Arp is certainly not an exception. There are many individuals who, like Arp, are repeat offenders who still pose a dangerous threat to the community. For example, Robert Speidel, a former New Jersey teacher, has been arrested for drunk driving three times: and, Marc Masciulli, also of New Jersey, has attained *nine* DWI arrests. *Id.* These problems are no surprise in a system that does nothing to treat the addictions that underlie these criminal acts.

important societal interest of eradicating the threat of drugs and alcohol that lie at the core of these criminal acts. However, the problem does not merely end at the criminal system's reluctance to entertain alternative solutions. An integral part of the criminal system's failure lies in the fact that even if the criminal courts sought to adopt alternative solutions that addressed the core of the problem, the courts would be structurally unable to do so. Indeed, it is this very structure that previously ruined rehabilitation attempts in the criminal courts.

B. *The Structural Formality of the Criminal System Renders It Unable to Successfully Implement Alternative Solutions*

The criminal court system is traditionally characterized by judicial proceedings conducted with stringent formality.[114] Formal procedures are adopted, in the opinion of the court system, to ensure equality and fairness among all participants.[115] First, the criminal courts place heavy emphasis on procedural formality. For example, judges, are required wear formal black robes, to ensure the appearance of neutrality.[116] Judges do not interact with the parties, instead acting primarily as a referee among the disputants in a given case.[117] Pursuant to stare decisis, the judge is frequently limited to consider only previously developed legal principles in her decision making process.[118] In addition, the jury is admonished to ignore all extraneous evidence, considering only evidence presented at the trial itself.[119] Moreover, the rules of evidence formalize and limit the presentation of evidence. For example, only legally relevant evidence is admissible at trial, and frequently relevant evidence is inadmissible because it is found to be unduly prejudicial.[120] The rules of discovery also formalize and limit both the

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[114] Judith Resnik, *Many Doors, Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 241 (1995) (exploring the various benefits and drawbacks of utilizing alternative dispute resolution as opposed to traditional adjudication).

[115] Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388 (studying the effects that alternative dispute resolution can have on minority groups).

[116] *Id.* Indeed, judges rarely, if ever, assume an "interventionist" posture in a dispute.

[117] *Id.*

[118] *Id.* at 1368.

[119] *Id.* at 1370 (stating that if a juror does consider extraneous evidence the juror may be removed from the case).

amount and type of information that is obtainable from the opposing party.[121] These procedures evince the notion that the criminal system strives to attain an orderly and predictable trial environment—one that is insulated from outside information or extraneous influence.

In addition to procedural formality, there is a *communicative formality* that governs how, when, and in what manner each side is permitted to speak at trial. For example, the client normally does not utter a word at trial, and is instead represented by an attorney who acts as an intermediary, representing the voice of the client. Furthermore, the attorney's communicative ability is governed by strict time and manner restraints.[122] As Delgado explains, the attorney "[h]as a prescribed time and manner for speaking, putting on evidence, and questioning the other side."[123] The attorney, speaking for the client, may speak only to the judge, never to the other party. As Delgado states, "[c]ounsel for the parties do not address one another, but present the issue to the trier of fact."[124] By doing this, communicative constraints go a long way to fostering an adversarial relationship among the parties because it avoids party interaction, it discourages client involvement, and rejects "irrelevant" or extraneous information.[125] These procedural and communicative restraints "[p]reserve the formality of the setting by dictating in detail how this confrontation is to be conducted."[126] While this stringent formality may be invaluable in certain instances, it has particular drawbacks that make its structure especially unsuitable for adjudicating certain crimes of addiction and fashioning a successful alternative solution.

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[120] FED. R. EVID. 404 (explaining that if the probative value of the evidence is outweighed by a danger of undue prejudice, confusion of issues, or unfair delay, then it will be inadmissible in a court of law).

[121] FED. R. CIV. P. 26. There are many situations in which these formalized rules may be invaluable. For example, these rules may force a party to turn over evidence to which the other side may never have had access to. In these situations, the formality does have value. However, where the object is to get at the core of a personalized addiction, strict formality is less beneficial.

[122] *See generally* Delgado et al., *supra* note 115, at 1388 ("Our judicial system, in particular, has incorporated societal norms of fairness and even-handedness into institutional expectations and rules of procedure. . . . The rules preserve the formality of the setting by dictating in detail how this confrontation is to be conducted.").

[123] *Id.*

[124] *Id.* This aspect of the formal judicial process discourages party interaction, which goes a long way toward fostering a sense of remoteness among the participants.

[125] *Id.*

[126] *Id.*

1. *Procedural and Communicative Formalities Inhibit Open Communication and Cooperation Among the Parties*

Formality inhibits direct and open communication among the parties. As Resnik explains, "[t]he procedural requirements of adjudication are described as roadblocks to communication . . ."[127] Strict formality inhibits effective communication because it only allows certain information to enter the courtroom, leaving out information that, while not "legally relevant," could nonetheless have significant value both to the parties and the decision-maker.[128] Formal legal protocol can be so complex that the individual's voice becomes submerged, as she is forced to depend on her lawyer to represent her position. In addition, party communication, through their lawyers, is singularly channeled into one source, the judge, which prevents the parties from initiating open and direct colloquy with the other side. As a result, the artificial barrier that the court structure erects between them polarizes the parties. This fosters a sense of distance and estrangement among the parties because it prohibits the creation of intimate relationships that are often the product of open communication. "[F]ormal adjudication avoids the unstructured, intimate interactions . . . the rules of procedure maintain distance between the parties."[129]

The result of decreased communication, and the ensuing distance that it fosters, is that the parties are afforded no opportunity to work together, as cooperation becomes an abstract reality. Cooperation can have the effect of fostering interpersonal relationships among the parties.[130] As a result, parties may be inclined to work together toward a common goal, communicate more effectively, gain mutual respect, and accept more responsibility.[131] Collaborative undertakings can have a meaningful impact because they can facilitate the process of arriving at a mutually beneficial and effective resolution, allowing the parties to collaboratively probe an issue in an in-depth, incisive manner. However, the formality of the court system discards these potential assets and inhibits cooperation by effectively destroying inter party communication. Not only are the parties hindered in their chance to unite and cooperate in searching for a resolution, but the ability to get to the

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[127] Resnik, *supra* note 114, at 249.

[128] *See* FED. R. EVID. 404.

[129] Delgado et al., *supra* note 115, at 1388 (citation omitted).

[130] Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1171 (1997) (examining the role that apologizing can have on the ability of parties to reach a mutually beneficial resolution to their disputes).

[131] *See id.*

core of a particular issue is also thwarted. As Delgado explains, "the adversarial process is said to be least effective . . . for it focuses only on the symptoms of a problem and makes little effort to delve into its source."[132] By depressing participation, parties are not only polarized, but also ultimately reduced to passive bystanders who have no role in the problem-solving process.

The court structure perpetuates an adversarial and confrontational process of resolving disputes by dispensing with interactive communication and collaboration. First, by prohibiting interaction between the parties, and allowing communication only with the judge, the court structure is positioning parties *against* each other. By being forced to appeal only to the sole decision-maker, the parties are indirectly compelled to fashion separate interests, which are most likely to exist in conflict with the opposing party. The court directly forces a divergence, instead of convergence, between the parties and their respective interests and goals. By fostering a dichotomy of interests, this will inevitably exacerbate each party's self-interest.[133] When this occurs, the goal of "victory" or "getting your way" becomes the primary objective of the parties to the litigation. The substantive resolution of problems takes a back seat to the unmitigated self-interest of competing parties and the heart of the respective dispute may receive only superficial treatment. When this happens, the adversarial process inherently reveals its most negative drawback, "the problem remains after the disputants leave the courtroom."[134]

The danger with this approach is that if the problem of addiction is only superficially treated through punishment, it remains when the offender leaves the system. Thus, the community remains at risk that this individual will commit a similar crime, this time with graver results.[135] This highlights the premise that the criminal courts, because of their formality, should not adjudicate crimes of addiction. At the heart of many of these crimes (*i.e.*, drug possession, DWI) lies an insidious addiction to alcohol or drugs.[136] The solution to this problem lies in eradication of the underlying addiction. This

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[132] Delgado et al., *supra* note 115, at 1367. This is especially nefarious in cases of crimes of addiction because the crime itself is often the product of a substance abuse problem. Therefore, by failing to treat the underlying cause, the criminal court is ignoring the cause of the criminal act. As a result, there is little hope to "reform" the offender.

[133] *See* Resnik, *supra* note 114, at 250.

[134] Delgado et al., *supra* note 115, at 1367. As a result, the offender is likely to repeat the same crime whenever he succumbs to his untreated addiction. *See* Part III.A.

[135] *See* Part III.A.

[136] *See* Yost, *supra* note 82, at A12 (stating that in New Jersey, 33% of DWI arrestees admit that they drink alcohol every day and use drugs).

requires in-depth, extensive probing of the personal circumstances and situations that lead a person to choose this lifestyle. To accomplish this difficult task, there must be freewheeling communication and a collective desire to reach beyond self-interest into the interest of the afflicted individual. There must also exist the ability to work together, to collaborate in finding creative solutions that, while not in harmony with the law, have the best chance to treat the underlying cause of the problem. In order to deal with such sensitive issues, there must also be a sense of trust, a sense of respect, and a sense of responsibility between the parties, especially the offender. To reach this end, channels of communication must be opened, not closed; all information relating to the individual must be considered, not rejected; and most of all, all possible solutions and options must be included, not excluded. Through such an approach, we can move beyond a purely adversarial and confrontational method of resolving disputes—to the core of the issue—confronting offenders with addictions.

The problem with the criminal system is that none of these strategies is possible within its formal structure. The ability to communicate effectively and meaningfully between and among individual parties is discouraged. Parties are told when, how, and in what manner they can communicate. The judge is constrained to be an objective observer instead of an active interventionist. The dependence on lawyers quells the individual's voice and prominence at the trial. The opportunity to work together and collaboratively toward a common goal is replaced by a confrontational and adversarial form of resolving disputes and making decisions. Thus, this system displaces trust and respect in favor of contempt and self-interest. The procedural rules of evidence exclude, rather than include, much information that may be quite pertinent to an individual's personal or familial situation. The rules of discovery allow only certain relevant information to be revealed to the opposing party. It is clearly evident that these procedural and communicative barriers force a narrowing, rather than expansive, view of the adjudicatory process. Most of all, avenues for resolution in crimes of addiction is constricted toward only one end: punishment. Recidivism rates have demonstrated that punishment is utterly ineffective in the cases involving crimes of addiction because it never addresses the substance abuse problems that underlie the criminal act. It is clear that the traditional trial structure ignores and rejects the very elements that are necessary to effectively deal with the challenges presented by these criminal offenders. These problems would be mitigated to some degree if the judge, at the very least, was free to engage in creative decision-making. However, for the most part, she is not.

2. *In the Criminal Courts, the Judge Is Accorded Minimal Flexibility to Fashion Solutions That Address the Causes Underlying Crimes of Addiction*

Although lack of communication and collaboration has significant drawbacks, this could be mitigated to some degree for offenders with addictions if the decision-maker in the criminal court was afforded a significant degree of flexibility in the decision-making process. Unfortunately, the judge is as equally constrained as the parties. As stated above, the doctrine of stare decisis "is intended to produce *consistent* results in similar cases, and anomalous results can be subjected to appellate review."[137] Thus, when a judge is appointed, she implicitly agrees to apply existing legal principles.[138] The judge is not merely constrained doctrinally in her ability to exercise discretion and flexibility. The court structure perpetuates a mechanical, "apply the rules" type of judge because "the repetitive nature of their caseloads disposes judges to perceive a case not in terms of parties in dispute, but in terms of legal and factual issues presented . . . ."[139] Consequently, the administration of justice represents an *impersonal* endeavor, where legal precedence serves to significantly reduce judicial flexibility, thereby restraining judges from searching for creative, responsive, and plausible solutions that respond to the individual, not merely the criminal act.

The problem with this in the criminal system is that precedence, tradition, and judicial commitment focus almost entirely on incarceration as the primary response to crimes of addiction instead of treatment. If the judge "does her job" by adhering to previously established legal rules, she will be forced to utilize judicial responses to addicted offenders—responses that are proven failures. In this way, the judge is legally constrained, as her individual role in the decision-making process is significantly reduced. Thus, the judge is inevitably thrust into a proverbial "Catch 22." If she simply punishes the addicted offender, she will essentially be engaging in an exercise in futility, with minimal likelihood of reforming the offender. If she decides to reject

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[137] Delgado et al., *supra* note 115, at 1368 (emphasis added); *see generally* Owen M. Fiss, *Foreword: The Forms of Justice, The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 14 (1979) (discussing "[t]he task of a judge . . . as giving meaning to our public values and adjudication as the process through which that meaning is revealed or elaborated.").

[138] *See* Delgado et al., *supra* note 115, at 1368; *see generally*, John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978).

[139] Delgado et al., *supra* note 115, at 1368.

punishment and instead engage in solutions that address the addiction, she will almost certainly face recrimination from the legislature (who often prescribe sentencing guidelines), other judges, and the community itself. Furthermore, because some crimes of addiction are often mandated by statute to receive mandatory prison terms, the judge would face certain appellate reversal. The massive caseloads that judges endure will also prevent judges from truly engaging each offender and taking the time to fashion diverse alternative solutions. The picture is quite clear: the judge is simply unable to consistently explore solutions that address the substance abuse problems that underlie many crimes of addiction.

Some critics may argue that predictability in judicial response is beneficial because it allows parties to rely on the law. Individuals can comport their conduct in congruity with established legal principles. This argument does have force and in certain settings (*i.e.*, contract law), the predictability of the court system is certainly valuable and necessary. However, in the case of crimes of addiction, predictability is useless because it only refers the individual back to an outcome that is a total failure—punishment. While it may be predictable that the courts will respond with punishment, it is also equally as predictable that such remedy will not work in the case of these offenders. Thus, the predictability and reliance argument fails when it stems from a remedial source that is, in and of itself, ineffective and nonresponsive to the issues presented by the addicted offender. The desire to rely on a failed remedy represents a misplaced loyalty to legal uniformity.

Critics may also assert that perpetrators of crimes of addiction actually deserve punishment, and that alternative programs will fail to hold them accountable for their behavior. The problem with this argument is that while some may agree that crimes of addiction warrant punishment, the community does not deserve a continued and perpetual threat in the neighborhood, which is exactly what will result from the superficial apportionment of penal sanctions. The recidivism rates tell the story—at the national level, over seventy-five percent of these offenders are repeating the same crimes once incarceration terminates.[140] This argument represents a classic tension between moral imperatives and plausible objectives. Society may express moral outrage at these crimes, thereby desiring imprisonment for crimes of addiction based on a "just deserts" philosophy. Yet, society concomitantly desires an eradication of this behavior and removal of this threat from the community. Punishment may vindicate the former, but it fails in the latter. A decision must be made as to which objective deserves more prominence. By adopting an objective that fulfills the moral imperative, the criminal system

[140] *See* Part III.A.

is inherently perpetuating an insidious disease that threatens the entire community. Thus, any claimed vindication on the part of the criminal system is a mere abstraction. In reality, by not adopting a practical response to addiction, the societal interest is left unfulfilled, because the criminal courts—through punishment—inherently disregard the needs of both the offender and of the community.

In sum, the criminal justice system presents both a problem of ends and means when dealing with crimes of addiction. The ends of punishment are truly an ineffective response because they never address the problem of addiction that lies at the heart of crimes of addiction. High recidivism rates are a logical consequence arising from the failure to resolve the underlying cause. However, the ends do not tell the whole story. Because the criminal courts are so constrained in their procedural and decision-making ability, the formal means of the court both prevent alternative solutions and invariably lead to a failed end for these offenders: punishment. When the courts tried alternative solutions such as rehabilitation, they were a total failure because the courts' formal paradigm and countless procedural protections do not permit the kind of flexibility and in-depth assessment that a successful rehabilitative solution would require.

As a result, there exists a two-pronged problem in attempting to develop a successful judicial response to crimes of addiction. First, there must exist a solution that works (ends) in resolving the addictions that ignite these criminal acts. Also, there must exist a forum (means) where this solution can flourish, and where all factors necessary to successfully implement such a solution operate. Only in this way can we respond to society's and the victim's true practical interest in preventing these crimes and eradicating addiction. The solution must first involve an ends inquiry, and the next section proposes a well-known, and successful, solution to that problem.

IV. THE REHABILITATION MODEL, CRIMES OF ADDICTION, AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Unlike retributivism, rehabilitation is currently a peripheral consideration in our judicial infrastructure. It does not enjoy prominence in the criminal courts, and its detractors are far more boisterous that its supporters.[141] Under the rehabilitation model, the proper method to "reform" an offender is through obtaining a thorough understanding of the external factors that may underlie, and be responsible for, an individual's violation of the criminal

[141] Gray Cavender & Michael C. Musheno, *The Adoption and Implementation of Determinate-Based Sanctioning Policies: A Critical Perspective*, 17 GA. L. REV. 425, 426, 441 (1983).

code.[142] As a result, consideration of social, economic, and even medical factors are wholly relevant considerations in the rehabilitative calculus.[143] This part examines the rehabilitative model, followed by a practical examination of its application in an informal alternative dispute resolution setting, namely the drug courts.

A. *Rehabilitation and the "Curative" Ideal*

Rehabilitation theory arose during the mid-1800s.[144] Simply stated, proponents endorse a system that emphasizes treatment of the criminal offender, not punishment. This view derives from the rehabilitationist's premise that criminal behavior is primarily a product of "defective moral training," not inherent sinfulness.[145] This defectiveness is viewed as the by-product of societal influences, not merely individual vice.[146] The natural corollary for rehabilitation advocates is to devise a system "of moral training that would supposedly reduce the crime problem by instilling the proper values in members of the criminal class." [147] Based on this ideology, the rehabilitation advocate views the criminal offender as ill and in need of treatment, not morally depraved and requiring punishment. [148]

The proper aim of the penal system, then, is to reform the offender, with the goal of transforming the morally deficient individual into a law-abiding, contributing member of society. Earlier this century, a statement by the Philadelphia Society for Alleviating the Miseries of Public Prisoners echoed the rehabilitation sentiment:

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[142] *See id.* at 435–36. Cavender & Musheno note the following:

> Judges began to consider such mitigating circumstances as age and background before imposing sentences and in 1843 the first use of the insanity defense suggested that some defendants were not legally responsible at all. Within prisons, programs were developed around the goal of moral training, and incentives were employed to encourage participation in those programs.

Id. at 435 (citations omitted).

[143] *See id.*

[144] *Id.* at 434.

[145] *Id.* at 434–35. Cavender & Musheno explain, "[t]he depravity of the criminal class was explained as a function of defective moral training, a by-product of rapid urbanization and industrialization." *Id.* at 434.

[146] *See id.* at 434.

[147] *Id.* Cavender and Musheno state that this "explanation began to influence both sentencing arrangements and penal strategies by the mid-1800's [sic]. In many cases, it was simply inappropriate to hold a defendant fully responsible for a crime." *Id.* at 434–35.

[148] *See* Vitiello, *supra* note 28, at 1016–20.

> [T]he obligations of benevolence, which are founded on the precepts and example of the Author of Christianity, are not canceled by the follies or crimes of our fellow creatures.... By the aids of humanity... such degrees and modes of punishment may be discovered and suggested, as may, instead of continuing habits of vice, become the means of restoring our fellow creatures to virtue and happiness.[149]

Thus, the rehabilitation model is inevitably one of social utility.[150] Rehabilitation theory endorses a forward-looking or consequentialist approach, one that sees treatment not only for the individual, but also for the preservation of the public welfare.[151]

B. *Rehabilitation and Positivist Ideology*

The rehabilitation ethic is further bolstered by the positivist ideology.[152] Under the positivist approach, "defective moral training" is only the initial variable in realizing the factors that ignite criminal behavior.[153] Positivist theory does not stop at the societal level in analyzing criminal behavior. Positivists argue that criminal behavior, in addition to societal influences, "[is] the product of factors over which the individual has little or no control."[154] To support this notion, the positivist ideology cites factors such as education, poverty, biological anomalies, and psychological factors as relevant considerations that inhibit the individual's ability to make free, volitional choices.[155] Proponents of the positivist school of thought believe that the recognition of this reality should alter our approach to criminal

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[149] PHILADELPHIA SOCIETY FOR ALLEVIATING THE MISERIES OF PUBLIC PRISONS CONST. pmbl., *quoted in* H. BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA 81, 82 (1968), *reprinted in* Carl E. Schneider, *The Rise of Prisons and the Origins of the Rehabilitative Ideal*, 77 MICH. L. REV. 707, 727 (1979) (examining the origins and historic backdrop of the rehabilitative model).

[150] *See* Duff, *supra* note 9, at 4–12.

[151] *Id.* at 5–6.

[152] *See* Cavender & Musheno, *supra* note 141, at 435. Cavender and Musheno point out that "[p]roponents of the view argued that factors could be identified through such scientific techniques as experimentation and observation and that prison programs could then be developed that would eliminate the problems and thereby reduce crime." *Id.*

[153] *Id.*; *see, e.g.*, SAMUAL E. STUMPF, SOCRATES TO SARTRE; A HISTORY OF PHILOSOPHY (1966).

[154] Cavender & Musheno, *supra* note 141, at 435.

[155] *See id.*

justice.[156] This alteration resurrects the call for rehabilitation, instead of punishment, for the certain criminal offenders.[157] The positivist notion plays an important role for the rehabilitation advocates, because it exposes punishment as a potentially ineffective remedy in addressing the complex factors that comprise criminal behavior.[158] As we will see, the ethic of rehabilitation and its positivist underpinnings have begun to permeate certain alternative dispute mechanisms.

C. *The Drug Courts: An Alternative Dispute Resolution Mechanism That Successfully Utilizes Rehabilitation for Crimes of Addiction*

While the criminal system continues to utilize the retributivist model, quasi-alternative dispute resolution mechanisms have attempted a different approach: rehabilitation and treatment. Drug courts are paradigmatic examples of alternative dispute resolution mechanisms that reject the traditional punishment paradigm in adjudicating drug offenders.[159] In doing so, the drug courts have discovered the promise of rehabilitation and demonstrated the compatibility of utilizing rehabilitation in an alternative dispute resolution forum. In this part, I examine the efficacy of three such programs in New Jersey, Florida, and Oklahoma.

1. *The New Jersey Experiment: A Success Story for Rehabilitation*

In New Jersey, non-violent drug offenders are now diverted from the traditional criminal process. In these cases, most participants plead guilty, waive their right to a trial, and then embark on an ambitious alternative treatment program.[160] Subsequent to their guilty plea, drug offenders are assigned to judges, prosecutors, public defenders, and treatment experts, who, instead of punishment, design a plan of treatment and rehabilitation for

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[156] *See id.* Cavender & Musheno explain, "[t]he transition from a sanctioning policy based on the concept of defective moral training to one based on rehabilitation occurred . . . with the emergence of positivism." *Id.*

[157] *See id.* ("Such an approach would, of course, be good for society but would benefit the criminal as well."). In benefiting the criminal offender, we inherently benefit society because once addiction is eradicated, the likelihood that the individual will repeat the same crime substantially diminishes. *Id.*

[158] *See, e.g., id.*

[159] Carrie Johnson, *Feds Fund New Drug Court*, LEGAL TIMES, July 20, 1998, at 6.

[160] *Id.*

the offender.[161] Instead of working against each other, prosecutors, defense lawyers, and even judges collaborate on the best method to lead an offender onto the path of recovery.[162] Since its implementation in May 1997, more than 300 adults have experienced New Jersey's Drug Treatment program in lieu of the criminal courts.[163]

The success of this program has been laudable in comparison to the criminal courts. By implementing rehabilitation, these programs are effectively reducing recidivism rates among drug offenders in New Jersey. For example, a study conducted by the State Department of Corrections found that the recidivism rate for drug offenders who were processed through drug court was a mere twenty-three percent.[164] In Essex County alone, of the sixty adults who have gone through the drug treatment program, only one individual has been charged with a new offense.[165] Conversely, the rate for those offenders who were adjudicated through the traditional criminal process and given prison terms was seventy percent—three times as high.[166] At the national level, the recidivism rate for repeat offenders who are

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[161] Elizabeth Amon, *Courts That Work on a Human Scale Drug-Offender Diversionary Programs That Reward Success Rather Than Punish Failure Get Rave Reviews from Veteran Lawyers, Judges*, N.J. L.J., Aug. 24, 1998, at 1, *available at* WL, 153 N.J.L.J. 745. New Jersey's drug court program is still in its early stages. In the previous two years, over three hundred adult drug abusers have participated in New Jersey drug courts. Approximately two hundred of the participants have experienced drug court in Camden County, sixty in Essex County, and approximately sixty in Passaic County. The prosecutor and defense attorney ultimately decide who will be enrolled in the program. While it will take some time to assess the success of the program, early indications are that recidivism rates are lower than in the criminal courts. Furthermore, the drug treatment program in New Jersey is intensive, which provides a safe-haven for those officials who want to avoid being labeled "touchy-feely" for supporting this program. *Id.*

[162] *Id.* (noting how the respective roles of the participants are changing from an adversary posture to one of collaboration).

[163] *Id.* The drug courts are not entirely similar; many drug courts in New Jersey craft their own programs. For example, in Camden and Essex County, the drug court is primarily for non-violent drug offenders. In Hudson County, the drug court is primarily designed for juvenile offenders. *Id.*

[164] *See Try Drug Treatment, supra* note 83, at D12.

[165] Although these statistics are not thorough enough to conclude that the drug court in New Jersey is a success, they do represent a drastic divergence from the seventy percent recidivism rate that is pronounced among offenders who are processed through the criminal courts. *See* Amon, *supra* note 161, at 745.

[166] *See Try Drug Treatment, supra* note 83, at D12.

processed through the criminal courts is even higher—at seventy-seven percent.[167]

Furthermore, because of their success, the drug courts in New Jersey have received the imprimatur of judges, prosecutors, and public defenders.[168] Assistant Deputy Public Defender Yvonne Segars suggests the drug courts is "one of the best things that's happened in criminal jurisprudence in decades."[169] Attorneys are also heralding the informal structure of the drug courts. Essex County Prosecutor Joseph Donahue explains, "if you sat in one of the meetings, I'm not sure you'd know who was the prosecutor and who the public defender . . . it's not in the true sense adversarial—we're not playing our traditional roles."[170] Essex County Superior Court Judge Paul Vichens also lauds the program, stating, "I don't speak through a lawyer. I speak to the participants every week. We talk about problems and good things happening in their lives."[171] The program is so popular with legal personnel that one judge is even making house calls to monitor the status of drug offenders in the program.[172]

In addition, drug courts, as opposed to the criminal courts, are saving New Jersey a significant amount of financial resources. While it costs ninety dollars a day to keep a drug offender in jail, the cost at a treatment center

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[167] *See* Schmitt, *supra* note 86, at 4. Schmitt also examines an experiment conducted at St. Francis Center For Addiction in Pittsburgh. This program invited 200 non-violent drug offenders to experience treatment in lieu of incarceration. The offenders were treated at an outpatient center for a period of six months, and the results were astonishing—over ninety-three percent of these individuals completed treatment. This study was conducted in comparison to 200 similar non-violent drug offenders who were incarcerated. It was found that for these individuals, seventy percent of them were eventually rearrested. Clearly, this study is compelling evidence of the success of the drug courts in fighting the addiction problem. *Id.*

[168] *See* Amon, *supra* note 161, at 745. One of the main reasons that this program is receiving such high approbation is because of the flexibility it allows—judges and lawyers are working together to collaborate on the best methods to treat a particular offender. In this way, the adversary posture of decision-making is giving way to an informal method of dispute resolution. *Id.*

[169] *Id.*

[170] *Id.* Part of the reason that the participants are not playing their adversarial roles is because the offender has already pleaded guilty. The focus lies primarily on finding a treatment plan that suits the individual offender. This type of "individualized" treatment is a cornerstone of the rehabilitative model. *Id.*

[171] *Id.* (Judge Stephen Thompson extols the program, stating that "it's the best thing we've come up with yet." Essex County Prosecutor Joseph Donahue asserts, "it's a big gamble what we're doing, but so far it seems to be paying off").

[172] *Id.*

ranges from forty-five to sixty-five dollars per day.[173] Bruce Stout, Governor Whitman's senior policy advisor, confirms that it costs less to treat offenders than to put them in prison.[174] Moreover, Assistant Attorney General Ronald Susswein explains that "financial benefits are undeniable if savings from the drop in recidivism are added to the revenue created when participants pay taxes." [175]

The program in New Jersey is successful because both the community and the offender benefit from the reduction in drug activity. Whereas criminal courts have been ineffective in reforming drug offenders,[176] the drug courts are a proven-and hopefully lasting-success in eradicating the offender's addiction. Ultimately, this benefits the community in two ways. First, the public safety is enhanced through a reduction in drug activity and drug-related crimes. Second, reformed offenders have the opportunity to become productive members of their respective communities. As Susswein states, "'You get better results, greater public safety, savings in tax payer money,' and . . . 'if this breaks the cycle of addiction, what could be better than that?'"[177] In New Jersey, drug courts, as an alternative dispute resolution mechanism, are an undeniable success in part because of their emphasis on rehabilitation, not retribution.

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[173] *Try Drug Treatment, supra* note 83, at D12. Thus, the community benefits in two ways. First, there is a significant drop in the amount of resources needed to sustain an addict in prison. Second, the drop in recidivism, which now stands at twenty-three percent in New Jersey, contributes to overall community safety. *Id.*

[174] Amon, *supra* note 161 (maintaining that "advocates say the programs are reducing the turnstile traffic of drug addicted felons between the streets and jails, the hallmark of the traditional criminal justice system").

[175] *Id.*

[176] This refers to the recidivism rates, which are three times as high when offenders are processed through the criminal courts. *See Try Drug Treatment, supra* note 83; *see also* Schmitt, *supra* note 86 (The national recidivism rate is seventy-seven percent for drug offenders. In Fulton County, the recidivism rate was seventy percent for offenders processed through the criminal courts. Conversely, it was thirty percent for those that utilized drug courts.).

[177] Amon, *supra* note 161, at 745. In part because of this success, President Clinton, in 1998, ordered $800,000 in federal money to go to the New Jersey drug courts. *Id.*

2. *The Florida Initiative: Rehabilitation in Action*

Since its inception in 1996, Florida drug courts are becoming primary tools in the battle against drug addiction.[178] As in New Jersey, individuals who are convicted of non-violent drug possession are now being diverted from the traditional criminal courts in favor of Florida's drug court paradigm.[179] The drug courts strive to alleviate the substance abuse problems that afflict many offenders, and judges are granted increased discretion to fashion programs that respond to the needs of individual participants.[180] Once an offender is accorded a treatment program, he undergoes regular status hearings and counseling sessions that monitor the progress of the respective offender.[181] Indeed, the supervision in the drug court program is often more intensive than in the correctional system.[182]As in New Jersey, by alleviating the substance abuse problem, the drug courts in Florida are significantly reducing the recidivism rate among these offenders. In Duval County, Florida, the recidivism rate for drug offenders is an astonishing 0.7 %.[183] Similarly, in Okaloosa County, Florida, the recidivism rate stands at 6%.[184] Furthermore, the drug treatment programs in Florida are assisting in overall community safety. In a statewide study of Florida drug courts, less than 20% of all participants were re-arrested for violent misdemeanor or felony violations.[185] These accomplishments are astonishing in contrast to the recidivism rates for offenders who did not undergo treatment for their addiction. In Florida alone, the recidivism rate for offenders who go

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[178] *See* Pace, *supra* note 84, at 44. In fact, Florida was the first state to commence the drug court idea. It was initiated by then Florida Attorney General Janet Reno in 1996. *Id.*

[179] *See* Schmitt, *supra* note 86, at 4. Schmitt also examines the drug court program in Fulton County, Georgia. So far, Georgia has "graduated" 153 people from its drug court program. *Id.*

[180] *See* Killian, *supra* note 84, at 15. A report by the Florida Office of Drug Control explained, "this flexibility not only allows greater control and participation in the program at the local level, but it also promotes the judicial oversight that is essential for program success." *Id.*

[181] *Id.* (asserting that failure to scrupulously adhere to the parameters of the treatment program can lead to implementation of sanctions).

[182] *Id.*

[183] *Id.*

[184] *Id.* Due to this success, the report by the Office of Drug Control in Florida stated, "given such demonstrated results, drug courts are assuming a greater role in the fight against illegal drug abuse." *Id.*

[185] *Id.*

untreated through the drug courts is 70%.[186] Clearly, this data demonstrates that the rehabilitation model is a significant factor in Florida's successful battle against crimes of addiction.

Florida drug courts are receiving widespread approbation because their rehabilitative approach seeks to address the insidious addictions that underlie these crimes. James R. McDonough, Director of the Florida Office of Drug Control, supports utilization of the drug courts, "[w]hat they do is get to the *core of the problem.*"[187] This is especially important because many crimes of addiction are motivated by substance abuse problems. "[T]hey either committed the crime to get the drug or they were high on the drug when they committed the crime."[188] McDonough explains that if drug treatment is not embraced, "what happens is the average inmate gets out after forty-eight months and goes right back to the culture he came from... he is still an addict, he still has those tendencies or cravings to go to drugs."[189] Because of their success in fighting the addiction problem, Governor Jeb Bush has endorsed the drug court effort, recently calling for greater expansion of the drug courts in Florida's effort to reduce the 1.2 million drug users estimated to exist in Florida.[190] The expansion of the drug courts and its widespread support stem from the fact that they are getting results and eradicating a problem that has consistently plagued the traditional courts.

In accomplishing these objectives, Florida is also saving a significant amount of financial capital. Under Florida's drug courts, the average cost of treating a drug defendant is approximately $1,800 per year.[191] This figure pales in comparison to the $26,000 it costs per year to keep an offender in prison.[192] However, the savings in money represent only the beginning. By rehabilitating addicted offenders, these individuals have the opportunity to become contributing members of society. Drug Program Administrator Carl Reeves contends, "if we get people clean and find them employment, they're going to pay taxes instead of making us pay for them in the jails."[193] There

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[186] *Id.*

[187] *Id.*

[188] *Id.* This is evidence that the primary motivation driving commission of these crimes is the substance abuse problems that plague these individuals. *Id.*

[189] *Id.*

[190] *Id.* Bush acknowledges that it will take a "continuous" effort to curb the drug problem, but he plans to increase the utilization of drug courts in the fight against substance abuse in Florida. *Id.*

[191] *Court Names Panel to Implement Supervised Drug Treatment Program*, FLA. B. NEWS, Sept. 1, 1998, at 26.

[192] *Id.*

[193] Schmitt, *supra* note 86, at 4.

are now thirty-two drug courts in Florida,[194] and the plans for expansion amount to a realization that rehabilitation is working, and through this, the community, the state, and even the offender, are benefiting.

3. *Rehabilitation in Oklahoma: An Emerging Success*

Oklahoma has adopted an approach similar to New Jersey, as non-violent drug-offenders are now being diverted to treatment programs in lieu of punishment. Each drug court consists of a team that includes representatives from law enforcement, judicial, and treatment fields. To qualify for the program, offenders must plead guilty to their drug-related charges, waive the right to a trial, sign a contract with the court, and agree to a treatment plan.[195] Once participants enter the program, they undergo frequent supervision by the court.[196] As part of their negotiated pleas, participants must scrupulously adhere to the treatment plan, or face prison terms.[197] Participants in the program traditionally volunteer for the drug courts rather than experiencing the criminal court system.[198]

As in New Jersey and Florida, drug courts in Oklahoma are reducing the recidivism rate. The drug court in Seminole County, Oklahoma celebrates that 80% of drug court participants have not committed new crimes.[199] In Pontotoc County, District Judge Tom Landrith similarly reports that 80% of participants in their drug program have not committed new offenses.[200]

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[194] Killian, *supra* note 84, at 15 (conceding that despite these numbers, and the fact that Florida has the second largest drug court in the nation, the Florida drug courts still only reach a small number of the state's non-violent drug offenders).

[195] *Treatment-Based Courts*, *supra* note 93. The treatment plans take a holistic approach to rehabilitation, as programs range from substance abuse treatment to vocational training to treatment of mental health problems. *Id.*

[196] *Judge Now a Believer*, *supra* note 93 (noting that failure in these treatment programs can result in imprisonment for an offender).

[197] *Treatment-Based Courts*, *supra* note 93. The program in Oklahoma is only available for non-violent drug abusers. As Judge Hill states, "drug addicts need help. Drug dealers, however, need to be incarcerated." *Id.*

[198] Jay Hughes, *McCaffrey Attends First Graduation from Oklahoma County Drug Court*, ASSOCIATED PRESS NEWSWIRES, Aug. 14, 1999, *at* WL, 8/14/99 APWIRES 02:25:00 (reporting on Oklahoma's first "graduation" ceremony for drug court graduates).

[199] *Treatment-Based Courts*, *supra* note 93.

[200] *Id.* Drug Court Judge Doug Haught details of one of his many cases, "When she came to my court, she was testing positive for three different kinds of drugs. When she left, she was clean." Ron Jackson, *"Other Children" Get Second Chance*, THE DAILY OKLAHOMAN, Dec. 21, 1999, *available at* LEXIS, News Library, New Group File.

Furthermore, District Judge Charles Hill asserts that the majority of offenders who utilize drug court are eradicating their addictions and becoming productive members of their communities. [201] By reducing recidivism, drug courts seem to be offering a solution that eluded the retributivist minded criminal courts.[202] As Bronstad explains,

> For years now, substance abuse offenders have been in a revolving door of substance abuse, crime, incarceration, re-offense and re-incarceration. These people continue to recycle through the system, *because their substance abuse problem is not being treated. Drug Courts are helping to break that cycle, which ultimately benefits all of us.*[203]

White House Drug Policy Director Barry McCaffrey agrees with the rehabilitation approach of drug courts, concluding that "society benefits...by giving non-violent drug offenders a *second chance rather than jail time.*"[204]

Both participants and judges are heralding the success of the rehabilitation-centered approach of the drug courts. Bronstad explains, "drug courts aren't soft on crime, they're tough on addiction."[205] Judge Hill echoes the drug courts' success in Oklahoma, maintaining that "they stop abusing drugs, or whatever they are doing to support that addiction."[206] Sandra Bruner, a long-time drug abuser whose addiction was treated through the drug courts, asserts, "this program has given me back my life . . . if it was not

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[201] *Judge Now a Believer*, *supra* note 93; *see* Legal Beat, *supra* note 96. Judge Hill explains, "they stop abusing drugs and doing whatever they were doing to support the addiction—shoplifting, embezzling, forging prescriptions. They turn into productive citizens, rather than being a burden to the state in prison." *Judge Now a Believer*, *supra* note 93.

[202] *See* Hughes, *supra* note 198 (maintaining that the reduction in recidivism rates is clear evidence that drug courts offer an effective alternative to criminal courts, and as McCaffrey states, "[t]he drug court system is not magic, but it is the best things we've found so far to deal with it").

[203] *Treatment-Based Courts*, *supra* note 93. Judge Landridth agrees with Bronstad, suggesting that, "I knew what we were doing wasn't working." *Judge Now a Believer*, *supra* note 93.

[204] Hughes, *supra* note 198.

[205] *Treatment-Based Courts*, *supra* note 93. Judge Hill explains, "[i]f they flunk... they are sanctioned immediately. Sanctions may range from additional community service or support group meetings, to jail time." *Judge Now a Believer*, *supra* note 93.

[206] *Id.*

for this program, *I would either be dead or in the penitentiary.*"[207] Kay Allen, Director of Youth and Financial Services suggests that as a result of drug courts, "we see . . . individuals and families who are starting to get help, people who otherwise wouldn't ask for help."[208] Oklahoma District Judge Doug Haught echoes this enthusiasm, declaring that the drug court "is very rewarding . . . [w]hen these kids succeed, we clap and cheer . . . it's worth it because it's personally rewarding."[209]

Like the drug courts in New Jersey and Florida, the Oklahoma initiative is saving taxpayers a significant amount of financial resources.[210] State Drug Court planner JoAnn Bronstad explains that, "not only are we helping certain offenders . . . but we are also saving the state millions of dollars that won't have to be spent on incarcerating non-violent offenders."[211] While it costs the state $15,000 a year to keep someone in prison, the average cost of treating addiction is only $2,800 per year. [212] In Oklahoma County alone, the drug court has saved the county almost $1.9 million in less than a year.[213] McCaffrey re-enforces this sentiment, stating that "the first thing you do is save the cost to the prison system."[214]

The rise, and subsequent success of drug courts, is not surprising because it focuses on the substance abuse problems that lie at the heart of crimes of

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[207] Hughes, *supra* note 198 ("[T]here are thousands of people like myself who want to quit living a life of addiction but don't know how to go about it."). The drug courts seem to be providing an effective solution. *Id.*

[208] Jackson, *supra* note 200.

[209] *Id.* The Drug Court is personally rewarding for judges like Haught because they have fostered personal relationships with many of the participants in the program. Haught has framed photographs of offenders who were rehabilitated through the system in his office. In many photos the judge is pictured with his arms around the individuals, after successful completion of the program. He notes, "I think the drug court[s] [are] necessary . . . I wouldn't take money for it . . . it's worth it because it's personally rewarding." *Id.*

[210] *Treatment-Based Courts*, *supra* note 93. By all indications, Oklahoma and New Jersey are not anomalous. Although data is scarce, "[a]ll indications are that the cost of shepherding someone through a drug court is a fraction of the cost of maintaining the same person in a prison cell." Pace, *supra* note 84, at 44.

[211] *Treatment-Based Courts*, *supra* note 93.

[212] *Judge Now a Believer*, *supra* note 93.

[213] Hughes, *supra* note 198.

[214] *Id.* The financial rewards are not only in the form of prison savings, but in health care costs, accidents, and lost wages. *See* Barbara Hoberock, *Drug Czar Attends OC Drug Court Graduation*, 12 TULSA WORLD, Aug. 14, 1999, at 12, *available at* 1999 WL 5410250.

addiction.[215] The success of the drug courts has spawned the proliferation of drug courts nationwide.[216] These courts have accomplished what the retributivist-driven criminal courts could not—a reduction in recidivism, judicial costs, and consequently, safer communities.[217] In contrast to their counterparts in the criminal courts, New York drug courts boast a 75% graduation rate and mere 20% recidivism rate. In Pittsburgh, drug courts have reduced recidivism rates to less than 33%. A recent study confirmed these results, stating that only 10 to 33% of drug court graduates are re-arrested for new offenses.[218] Contrast this with the 77% recidivism rate among those processed through the traditional courts, and the drug courts have clearly shown that, for certain crimes of addiction, *rehabilitation, not punishment is the best solution in our effort to reform these offenders.* Accordingly, the drug courts have made a believer out of many who had formerly endorsed retributivism. Judge Hill declares, "*I firmly believed in locking them up . . . but that just does not work. The drug court is the only program I've seen that works.*"[219] McCaffrey likewise hails drug courts as "the best thing we've got so far to deal with it."[220] Clinical Psychologist Dr. Normann Hoffman explains, "Drug Court is probably the best chance at abstinence for many abusers." [221] Through this approach, drug courts not only restored the rehabilitative ideal, but also have affirmatively shown that in certain settings, punishment is a wholly ineffective end for dealing effectively with crimes of addiction.

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[215] This is based on reduced recidivism rates, lower costs, and overall enthusiasm among those involved with the drug courts.

[216] *See* Hoberock, *supra* note 214, at 12. Drug courts are operational in eleven counties in Oklahoma, and there are about 600 drug courts across the country. Moreover, President Clinton has recently announced the release of $32 million for drug courts nationwide. Amon, *supra* note 161, at 745.

[217] Schmitt, *supra* note 86, at 4. The success of the program has made a believer out of Judge Stanley M. Goldstein, Circuit Judge in Florida. He explains of the drug courts, "It sounded impossible to me . . . . I saw what crack cocaine did to people, and I didn't believe you could get anybody off it . . . . I still wasn't convinced until . . . people started coming in with clean shirts and dress pants, and I thought, where did these people come from?" *Id.*

[218] Pace, *supra* note 84, at 44.

[219] *Judge Now a Believer*, *supra* note 93 (emphasis added). Judge Hill explains, "the majority of the offenders regain their self-esteem, and are accepted again back into their families and communities." *Id.*

[220] Hughes, *supra* note 198.

[221] Schmitt, *supra* note 86, at 4. Hoffmann explains, "[i]t provides them with a structure and accountability that a standard treatment center would not be capable of imposing."

Drug courts have fashioned a successful solution to the ends part of our inquiry. They have clearly shown the efficacy of rehabilitation in dealing with one category of crimes of addiction. Drug courts have shown that when the traditional criminal courts attempted to utilize rehabilitation, the end itself was not the problem, rather, the traditional, formal adjudicatory means in which rehabilitation was administered represented the problem. Accordingly, the second aspect of this inquiry commences by searching for a means solution where rehabilitation, and the attendant elements necessary to impart such a solution, can flourish. This is especially important considering that there exist additional crimes of addiction that require adjudication within the rehabilitative methodology.[222] Thus, the question of means is particularly crucial because no theory, no matter how noble, can be successful unless it exists in a forum conducive to its implementation. The solution to this dilemma lies in the forum of court sponsored mediation.

V. UTILIZING COURT-SPONSORED MEDIATION TO ADJUDICATE CRIMES OF ADDICTION: A NOVEL APPROACH

The utilization of court-sponsored mediation can represent a novel, yet effective, means by which we adjudicate crimes of addiction. Before we examine in-depth the plausibility of utilizing mediation, it is important to introduce the specific parameters of this alternative program. Pursuant to this alternative mediation program, an individual who is arrested and charged with an offense would first be required to plead guilty to his victimless offense and volunteer for court sponsored mediation.[223] This would be the individual's only contact with the criminal court. The reason for such a requirement is based on the fact that any attempts at rehabilitation would be thwarted unless the offender, at the outset, acknowledged the wrongdoing in his action and the inherent necessity for treatment. Also, at the pleading stage, the offender would be entitled to the full panoply of procedural safeguards, in order to ensure an informed decision on his part. Once the

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[222] Offenses such as DWI, DUI, and public intoxication are crimes of addiction that require treatment, not punishment. Furthermore, alcohol related offenses occur with such regularity that a rehabilitative solution would be especially timely. For example, in 1998, in New Jersey alone, over 500,000 individuals were arrested for DWI. Yost, *supra* note 82. It would be improbable for the drug courts to expand their services to adjudicate these individuals. Also, many states still do not have drug courts, and drug courts are not the only alternative forum where the rehabilitative approach can be successfully administered. *See* discussion *infra* Part V.

[223] Since the success of mediation depends on the individual's effort, it is important that the individual have the desire to participate in the program. This will ensure that the individual is at least somewhat committed to rehabilitation and recovery.

offender has pleaded guilty, he would be diverted from the criminal courts into a mediation program that, after careful and thorough examination of the offender, would place this individual into a treatment program that aims to treat the addiction, not merely punish the offense. There is one caveat to such a program: the ability of the individual to avoid prison or further detainment shall be contingent upon his successful completion of the program. To assist in completion, there will also need to be continued supervision and monitoring after the completion of a specified program. The rationale behind such an approach is that if the individual fails or shows little initiative to cure his illness, then the threat to society remains, in which case incarceration or further rehabilitative efforts may be necessary.

The success of such a program will depend heavily on the characteristics and structure of mediation itself. Because of its informal paradigm, mediation can be an effective alternative forum for adjudicating crimes of addiction. If successfully and carefully used, mediation can exist as the mechanism that vindicates the societal interest in seeing this behavior eradicated. Mediation will adopt a response that has proven successful in reforming perpetrators of crimes of addiction: rehabilitation and treatment.[224] In doing so, mediation can act as a conduit for the resurrection of rehabilitation and the restoration of the community. Unlike the criminal courts, the characteristics that comprise mediation are most conducive to achievement of this objective.

A. *Mediation's Informal Procedures Make It More Conducive for Implementing the Rehabilitative Model*

Mediation represents "a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute."[225] Mediation would be ideally suited to deal with crimes of addiction because it adopts an informal posture of decision making. Mediation eliminates many formalities that are cornerstones of the traditional judicial process. For example, the rules of evidence and discovery usually do not apply.[226] In some cases, the right to counsel is not required, and

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[224] The drug courts exemplify the success of rehabilitation.

[225] Stephanie A. Beauregard, *Court-Connected Juvenile Victim-Offender Mediation: An Appealing Alternative for Ohio's Juvenile Delinquents,* 13 OHIO ST. J. ON DISP. RESOL. 1005, 1011 (1998) (examining the efficacy of juvenile offender mediation programs in several Ohio counties).

[226] Delgado et al., *supra* note 115, at 1366.

adherence to substantive legal principles is relaxed.[227] In essence, mediation's structure consists of a series of de-formalized, de-centralized procedures that are aimed at substantive resolution of problems rather than loyalty to procedural niceties.[228] It is these very procedures that allow mediation to adopt rehabilitative solutions that the drug courts have shown present a genuine chance to reform offenders with addictions.

1. *Mediation Allows the Adjudicator a Significant Degree of Procedural and Legal Flexibility*

Mediators are afforded a significant degree of latitude to assume different roles in facilitating discourse among the parties involved.[229] As Levi explains, mediators "may take on numerous roles facilitating communications between parties and in seeking solutions."[230] The role of the mediator can has been characterized in many ways, from that of a "process facilitator,"[231] a "resource expander,"[232] a "trainer,"[233] a "problem explorer,"[234] and most importantly, a "leader."[235] Levi highlights these differing roles, explaining that "a mediator may act as a guardian of discipline . . . as a confidential advisor . . . or as a consultant charged with generating creative, mutually beneficial solutions."[236] Furthermore, some mediators meet individually with each side of a dispute.[237] Clearly, these descriptions highlight the notion that mediation affords flexibility to adjudicators that does not inhere to judges in the traditional trial process.

The flexibility afforded to mediators is especially beneficial for crimes of addiction, because it affords the mediator the opportunity to become an active participator, not a passive bystander. Individuals who commit crimes of addiction, such as drug or alcohol abusers, can not have their illness eradicated in prison because prison abandons treatment alternatives. However, if we divert these individuals into an informal mediation paradigm, the mediator will have the opportunity to engage the individual's problem, to

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227 *Id.*

228 *Id.*

229 Levi, *supra* note 130, at 1169.

230 *Id.*

231 CDR Associates, CENTER FOR DISPUTE RESOLUTION, MEDIATION 1 (1989).

232 Levi, *supra* note 130, at 1169–70 n.110.

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.* at 1169.

237 *Id.* at 1169–70.

engage in creative solutions that will address the cause, not merely the effects, of the problem. As Stipanowich explains, "[s]olutions are limited only by the imagination and willingness of . . . the mediator."[238] Unlike the criminal court, the mediator will not be forced to apportion punishment to an individual knowing that such a response would be wholly ineffective in treating the problem. Instead, by having the opportunity to search for creative resolutions, the adjudicator will be able to entertain remedies that work, such as rehabilitation or treatment programs. In this way, our system would be adopting responses that provide an optimal chance for alleviating the addiction and thereby reforming the offender. In the traditional court paradigm, the judge would have no such flexibility, and thus would not have the opportunity to explore in depth the problem that led an offender to violate the law. The informality of mediation makes such an approach possible.

In addition, flexibility and discretion, the hallmarks of mediation's informality, will be enhanced because mediation relaxes adherence to both substantive and legal principles.[239] Simply stated, the fact that a mediator is free to entertain novel solutions will have reduced efficacy if the mediator would nonetheless be constrained by substantive and procedural rules of law. Instead, because of the de-emphasis on legal mores, the mediator will not be bound by the stringent constraints of legality, leaving him free to come up with creative solutions without constantly feeling that he may be in contravention of the law. This approach avoids the "Catch-22" dilemma of the traditional courts, where a judge is often faced with "all or nothing" decisions that, based on precedent, necessitate a particular outcome.[240] This can lead to decisions that, while legally correct, are not truly in the best interest of the offender or society. Conversely, under the informality rubric, the mediator will be free to engage in creative solutions, such as diversion to treatment programs, while the criminal court would be constrained to fewer options.[241] As Delgado explains, "modern rules of procedure reduce . . . options . . . [in ADR] the inquiry is wide ranging."[242] Adherence to legal precedence will not be the only source to which the mediator can refer in making such a decision. Principles of community values, mutual

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[238] Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation,* 81 KY. L.J. 855, 871 (1993) (studying the effects of a community based mediation program in Kentucky).

[239] *See generally* Delgado et al., *supra* note 115, at 1366.

[240] *Id.* at 1367. By "all or nothing" outcomes, I am referring to situations in which, via case law or statute, the judge is required to render a ruling that may not be in the best interests of the parties. In these situations, the law can have a constraining effect. *Id.*

[241] *See generally id.*

[242] *Id.* at 1374.

understanding, compromise, and increased discretion will allow the mediator more latitude in making an informed and personalized judgment. Viewing the process as one that strives for rehabilitation and restoration of the offender back into the community, the best interest of the parties and society, not legal strictures, will control the day.

Some may argue that a system, which dispenses in part with procedural and substantive law, fails to afford adequate protection to the rights of an individual.[243] For example, many would argue that in such a system, those who have more resources might be more inclined to oppress the weaker party.[244] Such a criticism is valid only on the presupposition that there is a gross disparity in both power and interest. In these situations, while prosecutors may have unlimited resources and access to legal expertise, their singular interest in incarceration may be somewhat diminished based on the failure of incarceration, coupled with the promise of rehabilitation as a method to alleviate this behavior. Furthermore, without a victim in the traditional sense, the pressure on the prosecutor purely to punish an offender is not as heightened. Coupled with the proven success of using rehabilitation in the drug courts, prosecutors may not be adverse to the proposition of utilizing mediation to explore treatment alternatives. As Essex County Prosecutor Joseph Donahue explains, "[i]t's a big gamble what we're doing, but so far it seems to be paying off . . ."[245] Absent a pure aversion to the remedial alternative, the interest of both sides can be similar because the objective has proven successful in the drug courts—that of rehabilitation and treatment for the addicted offender. As a result, the necessity of increased protections will be diminished because the two sides will be working for, and not against, the offender.

The fact that the offender will already have pleaded guilty will further diminish the danger of emasculating procedural safeguards. This is true because the prosecutors, despite the fact that there is no traditional victim, have the interest and desire to send an important message by securing these convictions. By requiring a plea of guilty, the prosecutor's primary interest in securing a conviction will already be served and vindicated before the commencement of mediation proceedings. The process of finding a rehabilitative solution will be separate from, and subsequent to, the determination of an offender's guilt. This highlights the important benefit of mediation; namely, that the search for a solution is not entangled with the adjudication of guilt or innocence itself. Since adjudication of guilt comes before the commencement of mediation proceedings, the only issue left for

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243 *See* Stipanowich, *supra* note 238, at 873.

244 *See id.*

245 Amon, *supra* note 161, at 745.

the prosecutor will be whether the remedy of rehabilitation is acceptable in lieu of prison. As stated above, the proven success of institutions such as the drug courts, coupled with the ineffectiveness of prison,[246] may diminish the prosecutorial interest in incarceration, enhancing the prospect of rehabilitation.

Even if the mediator employs a rehabilitative solution, the offender's ability to avoid incarceration is nonetheless contingent upon the successful completion or graduation from the program. Incarceration, upon the failure of an individual to successfully complete a treatment program, remains an alternative for the prosecutor and the mediator. As a result, even if the prosecutor opposes rehabilitation, he may be less inclined to object, knowing that incarceration or other remedies remain as alternatives should initial or subsequent rehabilitative efforts fail. In a way, the prosecutor gets the best of both worlds—he can agree to a novel solution that has already proven successful in many states via the drug courts, and if unsuccessful, there is still the option of incarceration if further rehabilitation options are rejected. Because of these mechanisms, there is a strong likelihood that prosecutors will have a diminished interest in taking advantage of procedural laxity. With the decrease in interest, there will be minimal desire for oppression.

The need for procedural safeguards is less important because the focus of the mediation is on generating a solution to help the offender's re-inculcation back into the community, not on, for example, deprivation of liberty at a trial. In a trial where guilt or innocence is at issue, procedural safeguards prevent the prosecutor from introducing illegally obtained evidence, or evidence that, while relevant, may be unreliable, such as hearsay.[247] These procedural safeguards are meant to protect the constitutional rights of the accused, credibility of evidence, accurate fact-finding, and to ensure fundamental fairness But this is primarily relevant and useful only at the trial stage where liberty is at stake, not after it has ended and guilt been decided. As a result, the emphasis on procedural rights, in a mediation setting that searches for a rehabilitative solution only after the guilt determination, is misguided. Strict adherence to procedural safeguards will thwart the attempt to find a creative solution, because it will permit the parties to endlessly assert their "rights" instead of accepting responsibility and seeking a plausible solution. Accordingly, there is little reason to believe that procedural laxity will produce oppression.

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[246] *See supra* Part III.

[247] Hearsay evidence is inadmissible at trial primarily because it lacks the indicia of reliability for admissible evidence and, in some circumstances, because of the defendant's Sixth Amendment right to confrontation of witnesses. *See* FED. R. EVID. 801.

The latter point is crucial because when implementation of rehabilitation was attempted by the criminal courts, rehabilitation failed not because the ends were ineffectual, but because the means were not conducive to successful achievement of the ends. The failure of rehabilitation in the criminal courts was due in large part to the incompatibility of formality and reformative jurisprudence. Part of this formality lies in procedural constraints, and in this way, procedure can serve to hinder, not help, both the offender and community in finding rehabilitative solutions. This, along with the previous discussion, illustrates that procedural necessities depend on context—on what type of proceeding the person is engaged in and what type of end is ultimately sought. Since the addicted offender retains all procedural safeguards at the time he decides to plead guilty, these principles are never compromised, as mediation occurs *ex-post facto.* Thus, the argument for procedural compromise is ultimately misplaced because it disregards the context and place at which mediation is initiated and the ends it seeks.

The varied roles that mediators can play, coupled with the relaxation of legal principles, create a structure where rehabilitation has a true possibility of becoming a reality. While the criminal courts seek to punish crimes of addiction, the deference afforded mediators will permit an increased exploration of issues and alternatives. In this situation, rehabilitation can flourish and become a predominant method for adjudicating crimes of addiction. The flexibility afforded to participants must not be one-sided, affording only the mediator flexibility. Instead, the only method by which mediation and rehabilitation can be successful for the offender is if participants are involved and openly communicating about potential solutions. Indeed, mediation is structured to promote this atmosphere.

2. *The Structure of Mediation Permits Open Colloquy and Collaboration Among the Parties*

Mediation not only affords the mediator an increased flexibility in the decision-making process, but it also provides the opportunity for open and candid colloquy among all parties, including the offender. The same is not true in traditional adjudication, where procedural niceties and stringent formality exist as a barrier to effective discourse regarding an individual's addiction. Judith Resnik, Professor of Law at New York University, explains, "[t]he formality of adjudication is perceived as undermining open communication."[248] Mediation takes a different approach, where informality encourages open candor among the parties. As Stipanowich explains, "[i]nstead of providing guideposts for settlement by approximating or

[248] Resnik, *supra* note 114, at 249.

predicting an adjudicated outcome . . . mediation allows parties to candidly express, in a private setting, the concerns that brought them to the table . . . ."[249] Thus, unlike the criminal courts, mediation can "take[] into account expressions that might be considered ['']irrelevant['']to adjudication . . . ."[250] The practical effect is that mediation's informality exists to give the offender a voice in the proceeding, which seems appropriate considering that the very purpose of the forum is to generate an effective solution that will lead the individual onto the path of recovery.

This is especially beneficial because with increased communication comes a heightened sense of cooperation and collaboration. In describing mediation processes, Stipanowich explains, "[m]ore than any other procedure, mediation seeks to supplant the adversary mindset of pretrial and trial practice with a perspective of cooperation and mutual betterment."[251] Resnik concurs with this proposition, explaining of ADR that "[c]onversation and cooperation replace conflict . . . ."[252] By fostering a climate of open communication and collaborative participation, mediation can inherently produce an increased sense of *respect* among the parties. As Levi explains in her article, "mediation's strength [is] its ability to transform relationships . . . by empowering individuals and encouraging mutual respect among parties."[253] The clear benefit from these propositions lie in the fact that through creation of intimate relationships, the parties can work together, not against each other, and work with the mediator "toward a creative resolution of their dispute . . . ."[254] By working together, the possibility that parties will fashion a mutually acceptable and beneficial solution will be enhanced.

This is especially true because effective collaboration serves an *enabling* function, allowing parties to explore an individual's illness in an in-depth manner. Stipanowich highlights this benefit, explaining that "[t]he potential result is a collaborative exploration of all sorts of issues—not just those with

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[249] Stipanowich, *supra* note 238, at 870.

[250] Levi, *supra* note 130, at 1170.

[251] Stipanowich, *supra* note 238, at 870.

[252] Resnik, *supra* note 114, at 249 (citing Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1 (1993)).

[253] Levi, *supra* note 130, at 1170 (citing ROBERT A. BARLICH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 20–21 (1994)).

[254] Delgado et al., *supra* note 115, at 1367 (citing Robert B. McKay, *Civil Litigation and the Public Interest*, 31 U. KAN. L. REV. 355, 369 (1983)).

legal labels—and a solution that reaches beyond judicial remedies."[255] Such exploration is not possible in the traditional courts, where formality tends to avoid getting to the heart of the issue. As Judge Jack Etheridge, a veteran of the traditional court system, explains of the courts, "[suits], countersuits, third-party practice, as well as the usual plethora of motions . . . are almost always contrived—and not at the heart of the real dispute. *Mediation, skillfully handled, avoids masking the real issues.*"[256] The ability to work together effectively serves to benefit the offender because it allows an incisive probing of the causes of a respective dispute, which often run deep and are difficult to ascertain. By exploring the root of the individual's problem, there is a better chance that participants can arrive at results that address and respond to the offender's illness, instead of only superficially condemning its results.

Mediation's ability to foster a sense of "working together" to collaboratively explore a problem will enhance the likelihood of success because it will create a feeling of responsibility and obligation among the parties.[257] For example, in a study of small claims disputes, Levi explains that "the consensual nature of mediated settlements resulted in a greater likelihood that parties . . . would abide by . . . agreements as compared with court judgments."[258] As Professors Craig McEwen and Richard Maiman explain, mediation fosters discussions "of general moral and interpersonal obligations as well as legal obligations," which "activate[ ] [a] sense of responsibility" in the parties.[259] Most importantly, by working together with a sense of mutual obligation and cooperation, "mediation makes it more likely that they will find the result acceptable."[260] This is a crucial factor because in a setting where successful rehabilitation depends on the individual offender, finding an acceptable solution becomes most important.

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[255] Stipanowich, *supra* note 238, at 870–71 (citing Jack Etheridge, *Mending Fences: Mediation in the Community*, TRIAL, Oct. 31, 1985, at 33).

[256] *Id.* at 870–71 n.104 (emphasis added).

[257] *See* Levi, *supra* note 130, at 1171 ("According to some advocates of mediation, the emphasis on communication and voluntariness renders mediation more likely to resolve disputes than adversarial style litigation.").

[258] *Id.* (citing CRAIG A. MCEWEN & RICHARD J. MAIMAN, MEDIATION IN SMALL CLAIMS COURT: CONSENSUAL PROCESSES AND OUTCOMES, IN MEDIATION AND RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 53, 60 (1989)).

[259] *Id.*

[260] Stipanowich, *supra* note 238, at 871 (citing Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 238–39 (1987)).

Based on the foregoing discussion, it is readily apparent how the informal structure of mediation could provide the maximal opportunity for successful resolution of crimes of addiction. Since the success of this alternative rehabilitation program depends on the individual offender, it is crucial to involve the offender in the process. Since mediation, by its structure, encourages this very involvement, it, rather than the criminal courts, is best suited for crimes of addiction.

Mediation fosters a climate of candid communication and creates a sense of egalitarianism with the offender. In the criminal courts, the offender is normally a passive bystander, ignorant of the legal dynamics of a case, and dependent on his lawyer to represent his voice. This all changes in a mediation forum, where the voice of the offender takes center stage, and where the offender becomes an integral participator in actively searching for a mutually beneficial resolution. The individual may discuss family circumstances, personal relationships, or previous events that shed light on his dependence on illegal substances. In mediation, the offender has the chance to speak of personal issues, that while important to him, would never have been heard in a criminal setting. While this may be "irrelevant" in trials, it is relevant here, as the offender is free to offer suggestions about the most optimal path toward rehabilitation. In essence, the offender does not just represent a problem that needs to be solved, but the offender becomes a problem solver, active in communicating his input. By being involved and informed, the individual will become empowered, believing not only that he can have a voice, but that his voice matters, that his voice is not subordinate to others, and that his is, in essence, part of the search for the solution.[261]

However, merely letting the offender take part in finding a solution most optimal for rehabilitation will not solve the problem. The offender still requires helpful guidance on the path to rehabilitation. This is where mediation's emphasis on cooperation and non-adversarial negotiating will prove most beneficial. While the offender may be inclined to discuss matters about his personal circumstances, others, such as the mediator, and even the prosecutor, will assist the individual by offering pragmatic solutions, providing information, and using their expertise to suggest appropriate resolutions consonant with the offender's circumstances. Like the drug courts, the adversarial process will be replaced with "teams of . . . prosecutors, defense lawyers, and treatment experts who collaborate

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[261] Katherine L. Joseph, Note, *Victim-Offender Mediation: What Social and Political Factors Will Affect Its Development?*, 11 OHIO ST. J. ON DISP. RESOL. 207, 212–13 (1996). *Contra* Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 763 (2000).

on the best way to put offenders on the right track."[262] By transcending adversarial roles, polarized sides can come together and work toward a common goal. The parties can then focus more effectively on the needs of their clients.[263] This is important because when the offender sees that people around him are committed to addressing the addiction, and not merely punishing him, it will ignite the individual's self-worth. Judge Isaac Jenrette explains, "someone in such a position taking an interest can give participants a confidence boost."[264] The offender can see the process as beneficial for, and not detrimental to, his best interest. Accomplishing this goal is crucial considering that, as stated, the success of the endeavor depends so much on the effort of the offender.

Cooperation can also enhance the potential success of the endeavor because dealing with addiction and substance abuse requires in-depth exploration, something mediation, not the courts, can provide. Indeed, substance abuse is an illness that cannot be dealt with in a cursory fashion. It is not an ailment that burgeons overnight, and it does not happen without cause. There are reasons, sometimes very deep, personal, and sensitive, that drive a person to drink excessively or use drugs. Only by exploring this causal relationship can we fashion a tenable solution that responds to causes, not simply effects. When speaking of rehabilitation in the drug courts, Drug Control Officer James McDonough explained, "[w]hat they do is get to the core of the problem."[265] One individual may require weekly AA meetings, while another may require more serious rehabilitative efforts, such as hospitalization or residential treatment. But it is difficult to fashion a successful solution without examining these issues, something the criminal courts make no effort to accomplish. In the criminal courts, probation or short prison terms represent the superficial manner in which crimes of addiction are adjudicated. Much more than this is required, and mediation's structure affords the chance for real discussion about addiction, about sensitive issues that need to surface on the path to rehabilitation. In this way,

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[262] Amon, *supra* note 161, at 745. Judge Paul Vichness was reluctant to endorse this approach by the drug courts, but the experience made him a believer in its success. Amon explains of Judge Vichness, "[h]e recently began a program of enlisting drug court graduates to teach current enrollees how to deal with the stress of quitting drugs and avoiding temptations that lead to relapse." *Id.*

[263] *See* Resnik, *supra* note 114, at 247.

[264] Schmitt, *supra* note 86, at 4.

[265] Killian, *supra* note 84, at 15. This is crucial considering the fact that the majority of non-violent drug offenders are in prison because of their unsuccessful battle with addiction. Furthermore, national figures indicate that a chronic drug addict costs society approximately $42,000 per year, making treatment options a necessity. *Id.*

not only will the self-worth of the individual be ignited, but the process will also be able to provide, as a practical matter, the appropriate diagnostic assessment that corresponds with the nature of an individual's addiction.

The question then becomes, even with all these advantages, will the offender still feel obligated to make a genuine effort towards recovery? While no solution can make any guarantees, this one presents the best chance. This is because mediation has the ability, through cooperation and open discourse, to foster interpersonal relationships, where the parties develop a genuine interest about the individual's success.[266] Fostering interpersonal and collaborative relationships will re-enforce a sense of obligation and responsibility.[267] Since mediation allows the criminal offender to be part of the solution, it is much more likely that "they will find the result acceptable."[268] This is most crucial here, since the individual's efforts are dispositive of the endeavor's success in alleviating addiction. Since mediation allows the individual to become active in the process, thereby making the rehabilitative solution more acceptable to him, the chances of success are thereby increased. In contrast, the criminal courts are decidedly impersonal, where no effort is made to know the offender, and where the offender *never* takes part in the solution. The ability of mediation to offer more effective and responsive solutions (*i.e.*, rehabilitation) is readily apparent.

Many individuals would question such a program on two grounds. First, critics may argue that it is overly idealistic and naïve to assume that an addicted offender will candidly discuss their personal life, much less talk at all. Even if they do communicate, it will be more likely than not that they will lie or mask the truth, rather than be honest and forthcoming. The success of the drug courts demonstrates that substantial progress is being made with these offenders.[269] Furthermore, because of its informality and flexibility, mediation will be less intimidating to the offender. Instead of being inhibited from speaking, the individual may be more inclined to communicate because of the informal nature of the proceeding. In describing the advantages of ADR systems, Delgado explains, "[t]hose who feel threatened or *intimidated by formal courts may be willing to bring a problem to an informal forum.*"[270]

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[266] *See supra* text accompanying note 209.

[267] *See* Levi, *supra* note 130, at 1171 (citing MCEWEN & MAIMAN, *supra* note 258, at 60).

[268] *See* Stipanowich, *supra* note 238, at 871 (citing McEwen & Maiman, *supra* note 260, at 238–39).

[269] *See supra* Part IV.C.

[270] Delgado et al., *supra* note 115, at 1366 (citing Derek Bok, *Law & Its Discontents: A Critical Look at Our Legal System*, B. LEADER, Mar.–Apr. 1983, at 21)

In a formal setting individuals may be less inclined to communicate, because they may feel a sense of inequality among the lawyers and judges present. But mediation's structure changes this perception, and with that, changes the role of the offender into an active participant. Since an individual has already pleaded guilty, candid statements will not be used against him in the present offense.

The idea that an individual will engage in stratagems or deceptions is without merit. It is fair to assume that by agreeing to plead guilty and enter mediation, an individual voluntarily sought out the mediation forum instead of facing a prison term, which evinces, on the offender's part, at least some commitment to the mediation. It is in the offender's best interest to speak candidly and make honest efforts, because failure in the rehabilitative efforts may lead to sanctions, including a prison term. It seems illogical that an offender would engage in deceptions, knowing that any failure on his part would mark a return to the very system that, by pleading guilty, he sought to avoid. Michael Flaherty, Vice President of St. Francis Center for Addiction, explains, "[w]e found that having offenders under the threat of a worse alternative really encourages motivation."[271] Since it is in the individuals' best interest to succeed in a program aimed at rehabilitation, the likelihood of deception will be reduced. In essence, the contingency of the program ensures that no individuals will "slip through the cracks" in the system. Additionally, the voluntary nature of the mediation program gives more credibility to those participants who actively choose, and are not compelled, to enroll in the program.

Critics may assert that while cooperation and communication are important values, they have no place in a system of resolving disputes. Instead, the adversarial system is best suited to represent the individual's interest and protect his rights. This argument would be more forceful but for the fact that under this program there would not be any room for an adversarial relationship. Since, as stated, the offender has pleaded guilty, the adversarial nature of the relationship will be diminished, if not completely extirpated. The prosecutor, in mediation, would not be trying to "convict" the offender, because that part of the process ended before mediation began. Instead, there will exist a comprehensive search for a solution that treats the offender's addiction. Adversarial behavior would be a destructive, not constructive, value to this undertaking.

(emphasis added). This highlights Delgado's argument that minority groups may be more intimidated by a formal adjudicatory setting. As a result, the informal nature of ADR can serve to enhance access for groups that would otherwise not seek redress. *Id.*

[271] Schmitt, *supra* note 86, at 4.

Of course, an individual may decide to forego mediation and fight at trial. This approach is invaluable in many settings. However, to those who would advocate this approach in cases of crimes of addiction, it must be noted that this approach will never solve the problem. It never delves into the symptoms of addiction, and it never seeks to treat the substance abuse problem, the very factor that led to the criminal behavior. In speaking of rehabilitation, McDonough suggests, "[i]f you don't do that, what happens is the average inmate gets out . . . and goes right back to the culture he came from . . . he is still an addict."[272] As a result, the real issues that are presented in crimes of addiction cases are masked. In such a situation, even if the offender "gets off," he still comes out a loser because his problem is never addressed. The community also loses because it is still at risk. Even if the offender is convicted, short prison terms or probation are the retributivist remedy, which further ignores the problem. With such a superficial approach, the outcome of the trial will nonetheless represent a "lose/lose" proposition for all parties. Hence, while the adversarial process is a valuable commodity in some instances, it is specious and misguided in the case of crimes of addiction.

The foregoing discussion reveals that mediation is the best choice for crimes of addiction for two reasons. First, mediation can serve as an effective means for resurrecting rehabilitative solutions, which clearly pose the best chance to treat and eradicate the offender's addiction, thereby successfully re-inculcating him back into society. Furthermore, mediation's informal structure does not mandate uniform and impersonal solutions, but allows the parties to engage each other in a meaningful, collaborative way. Channels of communication are opened, cooperation is born, and through this, creative solutions can be envisioned and personal relationships fostered. This structure creates a strong possibility of successfully alleviating an offender's addiction because of the feelings of personal responsibility and obligation that mediation fosters. Mediation serves as an effective conduit for the successful implementation of the rehabilitative ideal. Crimes of addiction will be treated with an end (*rehabilitation*) that can eradicate addiction, and implemented with a means (*mediation*) that can effectively impart the rehabilitative ideal to those offenders who seek to treat their addiction. Through mediation, we thus create solutions that have a real—and lasting—chance to work. However, there are still concerns that must be addressed in order to ensure the successful operation of this alternative program.

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[272] Killian, *supra* note 84, at 15.

3. *Mediation Decreases Dependence on Lawyers, Reducing the Possibility for Opportunism and Self-Interest*

Although mediation strives to foster a sense of active cooperation, it is important to ensure that mutual cooperation does not denigrate into opportunistic self-interest. This is possible when lawyers primarily focus on "winning and losing" rather than searching for beneficial solutions, such as rehabilitation. If lawyers focus on the "win/lose" nature of resolving disputes, this can often ignite the self-interest of the parties, thereby degrading the positive functions that allow mediation the chance to search for novel and creative solutions. Resnik highlights this theme, explaining that "[a]djudication is seen as a process that often brings out the worst in its participants . . . because it defines *self-interest* in such a fashion that requires inflicting losses, rather than maximizing gains."[273] If such an approach is adopted, the mediation process will become akin to the criminal process, where the singular goal of "victory" will transcend what is truly beneficial to the parties. This would signal a significant obstacle in the path of generating a successful rehabilitative solution for crimes of addiction, and this approach would frustrate attempts to work cooperatively and communicate openly.

Indeed, if lawyers become involved in an opportunistic manner, not only would communication break down, but the adversarial nature of the traditional criminal process will re-emerge, thereby destroying all the aspects of cooperation that make mediation a more desirable form of dispute resolution for crimes of addiction. As Levi explains in her article, "[l]awyers' participation in mediation may be viewed as undesirable because lawyers often obstruct nonstrategic communications . . . in order to protect parties against giving up [their] rights."[274] By obstructing communications, lawyers run the risk that parties will once again become polarized and that the processes of cooperation will break down. For this reason, "mediators view the parties' [not the lawyers'] participation . . . as important [*in*] *moving beyond purely adversarial negotiation* . . . ."[275] These represent the primary dangers facing mediation, because if self-interest and adversarial bargaining contaminate the process, then the advantages that mediation claims to possess, such as collaboration, mutual respect, and open communication, will rapidly evaporate.

The informal structure of mediation effectively decreases the need for lawyers to even be present, thereby diminishing the chance that lawyers will

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[273] Resnik, *supra* note 114, at 250 (emphasis added).

[274] Levi, *supra* note 130, at 1169 n.15.

[275] *Id.* at 1169 (emphasis added).

be tempted to engage in self-interest at the expense of collaborative problem solving. Mediation "levels the playing field" because it discards procedural and substantive formalities that are often beyond the realm of common knowledge. As a result, the offender will not need to depend on his lawyer to resolve procedural complexities, make nebulous legal arguments, or formulate intricate legal strategy. Resnik, suggests that these factors may "lessen parties dependence on lawyers . . . ."[276] The fact that an individual has already pleaded guilty further decreases the need for an attorney, because the mediation forum is almost exclusively remedial-driven.

Some critics may still argue that even if the individual has pleaded guilty, it is crucial for a lawyer to be present to explain in detail the ramifications of agreeing to any type of rehabilitation program. In essence, the lawyer's presence is still needed to protect the client's rights. This argument ignores the fact that this type of mediation will be *court-sponsored*, giving the presiding court subsequent review over the proceedings in order to ensure their fairness and even-handedness. The mediation will take place in the shadow of court supervision, adding incentive to conduct proceedings in a judicious manner. Furthermore, a lawyer is not always necessary to impart legal advice. Pursuant to court authorization, mediators should have the option of obtaining *legal counselors* for the individual. These can be neutral observers who advise, the individual on certain aspects of the proceedings, but who do not advocate. Since the proceeding is largely informal, and since guilt has already been decided, the importance of this issue is virtually nonexistent. If anything, the need for a lawyer is at the adjudicatory hearing, where addicted offenders must choose whether to plead guilty and enter mediation, or go to trial and face the possibility of prison. Since the mediation takes places *ex-post*, the necessity for the lawyer is simply not significant.

The fact that dependence on lawyers is diminished, coupled with mediation's informality, will inherently foster a sense of *access*.[277] Like the drug courts, mediation's informality affords it the opportunity to rehabilitate and treat individuals who would otherwise go untreated in the criminal paradigm.[278] Individuals who are faced with adjudication aimed at mere punishment may opt for a congenial, informal atmosphere that seeks to treat their affliction instead of condemning its results.[279] The creation of a forum

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[276] Resnik, *supra* note 114, at 247.

[277] *See* Delgado et al., *supra* note 115, at 1366.

[278] *See supra* text accompanying note 208.

[279] It should be pointed out that in such a program, individuals would be forced to plead guilty at the outset. This would serve the purpose of completely eliminating the culpability phase of the hearing.

that produces tangible, successful results would be an attractive alternative for anyone with this affliction who has violated the law. A person who believes in the strength and credibility of the legal system would probably be more inclined to seek legal redress. Similarly, a person afflicted with a substance abuse problem would be more likely to engage a system that he or she believes will assist in curing their illness.

B. *The Structure of Court-Sponsored Mediation will be Cost-Efficient, Saving the State Significant Financial Resources*

ADR can save the state a significant amount of money in two ways. First, the informal nature of the process lends itself to a speedy and efficient resolution of each case.[280] The de-emphasis on procedural safeguards allows for a rapid disposition of each case on the merits. The simplicity of the ADR proceeding greatly enhances the efficacy with which cases are processed.[281] Since the individual will have to plead guilty before entering the ADR forum, there will exist no burden on the state to provide representation. In addition, jurors need not be impaneled, and support staff can be kept to a minimum.[282] The ADR process will be more efficient than trial courts, where formal procedures and protracted trials often exact a burden on state resources.[283] Furthermore since countless individuals are arrested for crimes of addiction offenses each year, ADR can have a significant impact on cost-reduction practices.[284]

The rehabilitative disposition of ADR will also save money for the state. As discussed above, it is less expensive to send an individual to treatment than prison.[285] This will alleviate the burden on some of our prisons, while reforming first-time offenders who would otherwise likely re-cycle through

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[280] Delgado et al., *supra* note 115, at 1366. In ADR forums, jurors need not be selected and educated, and informal forums do not require the same amount of personnel that are required in the courts, such as clerks, bailiffs and court reporters. This way, ADR can be cost-effective for the state. *See id.* (citing E. JOHNSON ET AL., OUTSIDE THE COURTS 86 (1977)).

[281] *Id.* ("ADR's informality often obviates the need for attorneys; in some cases attorneys are barred. Even if attorneys are permitted, the brevity and simplicity of informal proceedings greatly reduce the costs of representation.").

[282] *Id.*

[283] *Id.*

[284] In New Jersey alone, 513,200 individuals were convicted of DWI offenses in 1997. Yost, *supra* note 82, at A12.

[285] *Try Drug Treatment*, *supra* note 83, at D12. (stating that while it costs ninety dollars a day to keep a drug offender in jail, it only costs forty-five through sixty dollars to put them through drug treatment).

the system, eventually ending up in prison.[286] By reducing recidivism, ADR can save the state a significant amount of capital. This will allow the criminal courts to concentrate their attention on more violent and egregious felonies—the crimes deserving retributivist responses. For these reasons, ADR exists as a tenable alternative to the traditional trial structure.

VI. CONCLUSION

This Note strikes a careful balance between theoretical justifications and practical efficacy. Most importantly, this Note highlights the role that ADR can play in the criminal context, as a necessary means for a successful ends. Without congruity of means and ends there is simply no possibility, no matter how noble the theory, to experience true practical success. This was exemplified by the courts' failure in adopting rehabilitation. Conversely, ADR, by combining elements of informality with creativity, serves an important role as a necessary means in solving a problem that has been plagued by failures and repeated tragedies. Mediation is a forum where rehabilitation can operate successfully. The desire to utilize rehabilitation in an ADR forum represents an endeavor that places practicality ahead of misguided morality, where true success is defined in terms of results, not merely by what is "popular."[287] From this perspective, ADR plays a crucial role in vindicating the societal interest because it serves to vindicate the victim's interest.

While this inevitably involves a schism or categorization of certain crimes into different forums, it is an endeavor well worth taking. With this approach comes a realization that judicial responses must vary as the nuances of criminal behavior vary. A system of uniform responses to criminal activity ignores the fact that different crimes may, in some circumstances, call for vastly different responses. If we adopt such an approach, we will be effective in vindicating the societal interest in preserving the public welfare. To do this, our system of justice, at least in some circumstances, must be forward-looking. This is where rehabilitation fills an important void that the courts have been unable to sustain in adjudicating crimes of addiction. Quite simply, certain offenders require treatment, not punishment. As a conduit for the rehabilitative approach, ADR can serve a useful function in reforming certain offenders and restoring the sense of faith in our judicial system.

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[286] The process of using ADR would be best for first-time offenders, who would otherwise repeat the same offense.

[287] For example, "tough on crime" politicians may win votes for these views, but in reality, they are of no use in these cases.